any sort, of the Federal Congress because it was remote and, as they feared, undemocratic, and might grow too powerful, so as to take the liberties away from the people or from the States; and of our State legislatures, which had exercised, during the Revolution, indefinite powers, when they put restrictions in the State constitutions limiting them also.

Now this jealousy has not decreased, but rather increased as time goes on. The later State constitutions, especially those of the far Western and Southern States, most notable of all, that of Oklahoma, increase very much the number of these restrictions; so that there is not to-day in the Union probably any State whose legislature has so much power as that of the State of Massachusetts, while in these newer States their wings are clipped so much as almost to take away their character of representative government. Still more, of late, is this being done where, as in the newer Western States, by the initiative and referendum, the people are allowed not only to make laws directly without the intervention of any legislature, but to have a veto whenever they demand it on the acts of the legislature itself. On the other hand,

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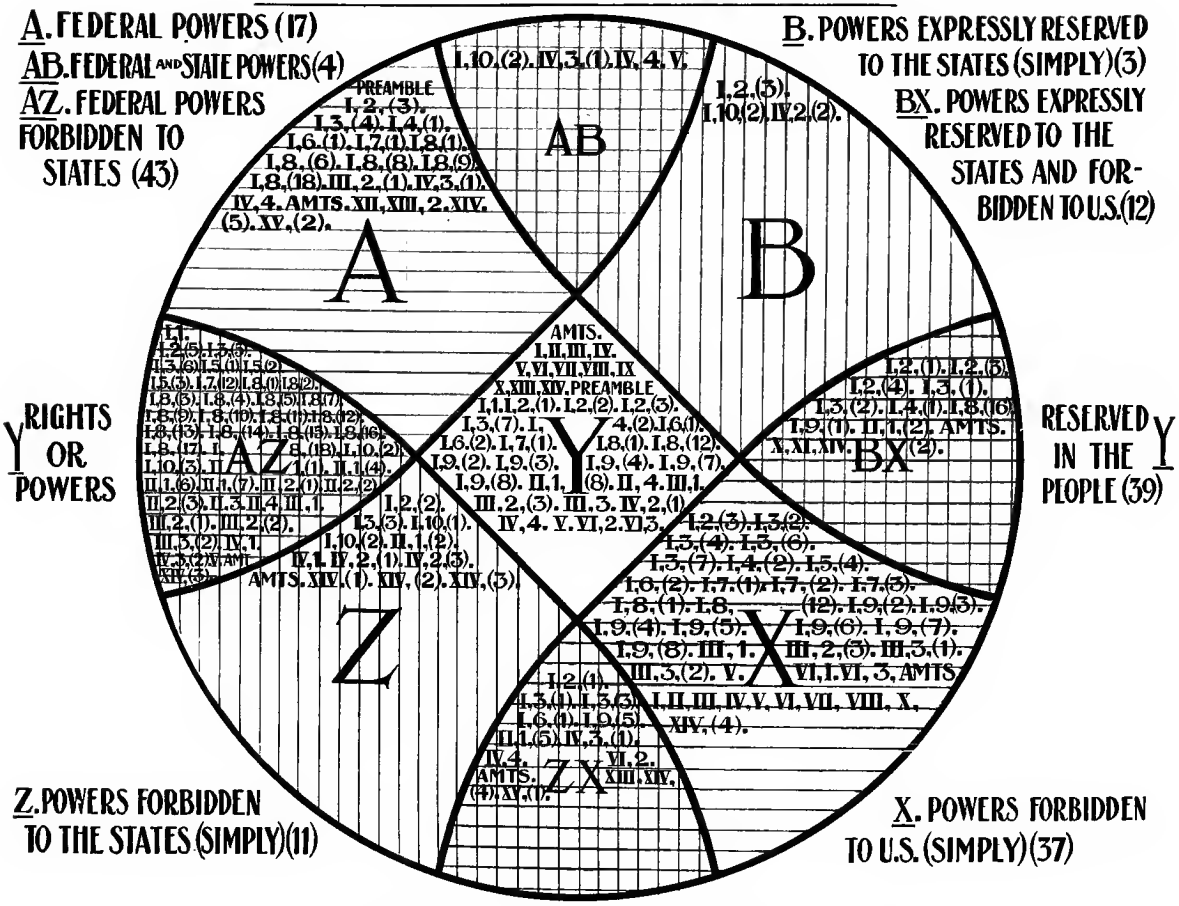
# DIAGRAM OF STATE AND FEDERAL POWER



# THE AMERICAN CONSTITUTION

THE NATIONAL POWERS
THE RIGHTS OF THE STATES
THE LIBERTIES OF THE PEOPLE

Lowell Institute Lectures
DELIVERED AT BOSTON, OCTOBER–NOVEMBER, 1907

BY

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# PREFACE

In these lectures I have used, for verification of facts, chronology, etc., the monumental work of Hannis Taylor, LL.D., "The Origin and Growth of the English Constitution," Boston, Houghton, Mifflin & Co., 1889, and the English classic, Taswell-Langmead, "English Constitutional History," sixth edition, London, 1905. For other facts and statements, their amplification and explanation, the reader is referred to my own work "American Constitutional Law; the Federal and State Constitutions," Boston Book Company, 1908.

The frontispiece is taken from the last-named book, by courtesy of the publishers.

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# THE AMERICAN CONSTITUTION

# I

## THE MEANING OF THE CONSTITUTION

THERE seems to be an impression abroad that our Constitution is a mass of dry bones; or at least that it is a technical document, in part faulty, and for the most part obsolete—like the rules of a game which has since so changed its nature that the old rules no longer apply. The Constitution has been likened to the frigate *Constitution;* a famous vessel in her day, but obsolete in type, no longer fit to cope with modern conditions. This metaphor is utterly misleading. I want to show you that it is not a mass of dry rules, but the very substance of our freedom; not obsolete, but in every part alive; more needful now than ever, and as fitted to our needs. Some of the constitutional rights which were thought of great importance under the Stuarts, or even one hundred years ago, may possibly seem less familiar and less

necessary to us now. Even if it were true, that would not make of the Constitution an "antiquarian curiosity." But when we come to discuss them, we should hesitate from hastily assuming that any one of them has grown so obsolete as to be unnecessary to preserve. A few months ago, the provision against Bills of Attainder—that is, condemnation for crime or forfeiture of civil rights without due process of law—would have seemed hardly necessary in America. Yet since then, in his praiseworthy zeal to punish a military disorder, so far quite within his constitutional right as Commander-in-Chief, we have seen our President dictate what was little else than an Executive Bill of Attainder—a thing which was hardly, if at all, attempted by the Stuart kings. Another instance—after the Norman kings were deprived of the power of making laws, the Stuarts, James I and Charles I, assumed the power to suspend them. This led to the protest of Chief Justice Coke and the Commons, and ultimately to the Civil War; so that finally after the Revolution it was put into the Bill of Rights that the king should have no

power to suspend the operation of any law. This also might seem obsolete; but if it were true—which it is probably not—that our present Executive recently promised to suspend or withhold the operation of the anti-trust law in case a certain great corporation were to take over the property of another, this would be an exact instance in point. No, we dare not say any part of this great document is obsolete, and it is all full of human meaning, of present application. It is to explain the true meaning of the Constitution, its human meaning, the safeguards that it gives to every one of us, the live issues that it still embodies, that I have been asked to give this course of lectures.

The study of Anglo-American constitutional law is that of the liberties of the people. It is neither a body of technicalities, as the demagogue is prone to consider, nor an instrument first new created in the year 1787, and now only an inconvenient impediment to the national destiny. Our own Constitution embodies and improves upon the English Constitution, and the English Constitution registers the total-

ity—the aggregate—of those great principles which in eight hundred and forty years of struggle the Saxon peoples have won back again from Norman kings, from Roman conceptions of the sovereign state. Each rising wave of freedom left its record in some historic document—then perhaps the times cause it to recede again—until the next flood leaves a higher record still. And the Federal Constitution, the whole of it, is nothing but a code of the people's liberties, political and civil; a code of many centuries' growth, which they willed to adopt in 1787, and willed should never be abrogated without the people's will.

I said eight hundred and forty years—reckoning from the Norman Conquest; but the main constitutional principles are much older and go back as far as goes the history of the English people. William might conquer England, but he could not alter their free laws; from every wave of Norman tyranny they emerge, clearer than ever. Each king in turn must learn to recognize their strength; until, in the English Revolution, the Crown finally gave over all attempt to hold itself above them.

And we have added in America two or three new principles which the world is agreed to consider the most remarkable of any of them. First of all, the great discovery that the people might be protected from any danger to their liberties, from the legislature or the courts as well as from the Crown, even from that Federal Government they were going to create; second, the great principle of the separation of the powers of government, which first appears in the Virginia Bill of Rights of 1776, just one month before the Declaration of Independence, and also written by Thomas Jefferson; and again in the Massachusetts Constitution of 1780, in the famous words of the closing paragraph of our great Bill of Rights: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." These last ten words, you remember, Daniel Webster said

were the greatest words contained in any written constitutional document. And this separation was without any precedent in actual history. Montesquieu had mentioned it, basing his discovery on the history of England—where a free people had repeatedly nearly lost its freedom by having the executive, that is, the King, assume legislative powers, that is, making the laws; or assume judicial powers, by interfering or controlling the courts which interpreted them. And a third great invention of ours, more rarely noted though clearly novel in the history of the world, was that wonderful scheme whereby local self-government, the control by the people of their own affairs, which was, from prehistoric times, a cardinal Anglo-Saxon right, was recognized and conjoined with the powerful national government, working directly upon the people, and not upon the States, as had been the case in all other federations of history and was the case even in our own under the Continental Congress. So that we, the people, manage our own domestic affairs, sue and are sued in our own courts, are tried under our local laws, while yet we have clothed

the national government at Washington with power adequate to defend the nation, maintain its dignity abroad, and duly regulate affairs of national concern. And the last wonderful invention—we might almost call this also an accident—was the making the Supreme Court of the United States—not the King, the Executive, nor even Congress—the high guardian of this Constitution itself; so that no law could be made and no act be done in possible violation of any of a man's constitutional rights that the man himself, be he the humblest citizen, could not go into a court and have the law annulled.

"Annul" is the usual phrase, but it is an incorrect one; and this brings us to the first great distinction I want to leave in your minds, namely, what is our Constitution, as opposed to an ordinary law or act of Congress.

The Constitution is the permanent will of the people; a law is but the temporary act of their representatives, who have only such power as the people choose to give them. When the people of a State, or the United States, come together and make a

constitution, they are doing the highest political act; and they themselves are the highest political power known to free Anglo-Saxon peoples. The people of Oklahoma, when they came together the other day to frame their Constitution, were the supreme political assembly known to a free world. They are the very source of all political power; nothing can withstand their will, and when expressed, it is permanent until they themselves in the same way choose to change it. Legislatures are but a small representative committee; for convenience delegated with a few, and only a few, of the boundless powers of a free people. Legislatures arose, as you know, in quite recent times. Almost down to the Conquest, the whole body of the Anglo-Saxon people made their law: the Witenagemot, or, as the Normans call it, the Great Council of the Realm. In theory every freeman could go, and was supposed to go, to these Witenagemots. Indeed, it is on record that at one of them held on Salisbury Plain, about a hundred years before the Conquest, there were sixty thousand voters present. This is "direct legislation by the people" of which we hear

so much to-day and which some of our western States are beginning to introduce once more. But, for obvious reasons of convenience, in the course of two or three centuries they got into the way of choosing a smaller number of men to represent them. This is what we call representative government; and this was called the great invention which the *English* people had given to the world's science of government. It was first used in the very assembly which drew up Magna Charta. It has been copied—like trial by jury—everywhere since; in every European country, now even in Russia.

Now, Parliament, in England, is supposed to have all the powers of the people; but we more jealously guarded the people's rights, and all our State constitutions, as well as the National Constitution, carefully say that Congress, or the State legislatures, do *not* have all the powers of the people; but only represent them in such matters as they have expressly delegated to them in our written constitutions; and that all other powers are reserved to the people, or to the States.

Now, then, I hope you will see why it is incorrect to talk about a court "nullifying"

a law. No one of our courts, not the Supreme Court of the United States, ever nullifies or can annul a *law;* but when there is a State statute or an Act of Congress on the one hand, and the permanent will of the people expressed in the Constitution on the other hand, and the two conflict—the courts have to choose which law to apply, and they apply the higher law, that is, the permanent will of the people as expressed in the Constitution—not the attempted act of their representatives beyond their own authority. The other law is really no law at all, and never was law; for under the American idea, that cannot be law, whether made by Congress, government, or President, by board or by commission, which in any way clashes with the permanent written will of the people. No other country in the world has this principle, whereby not even the government can make a law counter to the Constitution; nor any officer can do an act not authorized by it; and in either case the Supreme Court is made the umpire to judge. This system is the envy and the marvel of the rest of the civilized world.

The next great distinction between ours

and the English Constitution is this: the English Constitution was made to protect the people against the King, against the Executive alone; not against bad laws, against Parliament. It was a bulwark against Charles Stuart, Henry VIII, and George III; but it was no bulwark against the Rump Parliament of the later Commonwealth, or against the corrupt Parliaments of the Tudor kings. Therefore, in England, when the kings sought to re-enslave the people, they were apt to make the effort through a subservient Parliament, even more than by a subservient judiciary; for the English Constitution is no bulwark to protect the people from parliaments or courts. But we had the wonderful idea of protecting ourselves against any usurpation of government, and the usurpation of any government—even of our own—thus retaining the liberties of the people forever in their own hands, exercised in their own local courts, their own town meetings and their own legislatures, guarded by all the courts of the States and of the United States; so that even their own government, set up only so far away from them as Washington, might

not too much busy itself with their domestic concerns. For the one thing the English people learned was that a distant government, even benign—Henry VI in France, for instance, or even too much power centralized in London—was dangerous to the well-being if not the liberties of the people. The twelfth and thirteenth centuries are a continual struggle to keep power where it belonged—in the people's councils, not in the will of the King; in the county courts, not with the royal Chancellor. "The great original principle of the English judicial system was that of trial in local courts properly constituted—trial *per pais*, in the presence of the county, as opposed to a distant and unknown tribunal." (T. L., 28.) And, therefore, in our Federal Constitution we protected ourselves against usurpations even of our own government, or of either branch of it, Congress or President, on those home liberties which a thousand years' experience have shown to be, as it were, the irreducible minimum necessary to the Anglo-American people for freedom as they understand it. Now this was no accident; the Anglo-Saxon system is not to make constitutions ready-

made, but to let them grow out of events and the actions of free men; and though it might seem marvellous that our Democracy, a Democracy which for the first time in history grasped all the reins of government, legislative as well as executive and judicial, growing conscious of its power actually to *make* the laws, should, as a first step, have taken pains to put this curb upon themselves and invented written constitutions, State and National,—there were two reasons for it; and these reasons are opposite to one another.

The genius of the Anglo-Saxon people is to rule themselves. To a certain extent it had been done, at least so far as the King's powers were concerned, in England for many centuries: "The laws of the English, the most ancient of modern law, extend in an unbroken series from Ethelbert, the first Christian King of Kent; the earliest written collections are simply digests of local unwritten customs which had been handed down by oral tradition and were now put in writing to meet the needs of a more developed and centralized State organization" (T. L., 33), and we had not—the founders had not—any doubt of our ability to go on

tablishing a monarchy or a tyranny, the President of the United States and the Federal Congress have no right to direct interference with a State as such.

Now these two constitutions, State and National, were, as you know, for the first time put in writing by our forefathers—the first written constitutions in the history of the world. For the English Constitution is not contained in any one writing. This double safeguard, or set of constitutions, State and National, were drawn up with ends in view which were almost opposite to each other. And this is the next thing that I am going to ask you to remember. What our forefathers were afraid of in the *Federal* Government was an aristocratic or autocratic rule, or a remote power which might come to interfere with their domestic affairs. Therefore, the influences which restrained and limited the Federal Constitution were democratic. Most of its restrictions were drawn up by men like Jefferson, jealous of any government which was not direct from the people. The State constitutions, on the other hand, were rather aimed at protecting the propertied classes—

ruling ourselves. But we were doing two things which were novel in the world's history: we were setting up State legislatures with unlimited powers; and we were setting up a remote Federal Government which we were anxious to keep in hand. Remember, the State constitutions are older than the Federal Constitution, and served as model for it. And the framers had two things to consider: they were trying to make a national government which should be purely *political*, that is to say, have to do with the nation as a whole in its relation to other nations, should look out, therefore, for their peace and protect them in time of war; and also to create and maintain State governments, at home, to regulate the *social* affairs of the people. To the States, therefore, was intrusted a man's liberty in relation to other individuals, a man's private property, all the regulation of his domestic concerns; to the Federal Government, as such, the Federal Constitution gave but one power over the States directly—but one right to interfere with them—and that was, if they ever ceased to maintain a republican form of government. Short of that, of their es-

the aristocratic classes—from the omnipotent legislatures they were about to create. Therefore the restrictions in the State constitutions are mostly imposed on the democratic legislatures in the interest of property or of order. It was the propertied classes, the educated classes, which drew up the State constitutions and insisted most upon them; it was the democratic masses rather who watched so jealously the powers about to be given by the United States Constitution. Some things they were all united upon, first of all the great Bill of Rights; which is much the same thing in both; those marvellous clauses which grew from five sentences in Magna Charta to thirteen in the Bill of Rights of 1689, when they had had experience of the Stuart tyranny, and to sixteen in the Virginia Bill of Rights, and thirty in the Constitution of Massachusetts; and, in the Federal Constitution, the first ten amendments. These are the fundamental things; and the people of the United States refused to adopt the Constitution itself unless these ten amendments were promptly added; and so it was done. These, in other words, are the principles they cared for

most; and these are the principles of which I shall try to explain the importance in these lectures. Remember, it was the people under Jefferson who said to the Federal Government: "Thus far shalt thou go and no farther"; it was the educated, propertied classes, the Federalists at home in their own States, who said the same thing to the State legislatures to whose local government their personal liberties and private fortunes were about to be intrusted. And the historical reasons for both are that during the Revolution we had disastrous experience of omnipotent State legislatures, for the first time clothed with boundless power and recklessly using it, and in the Revolution also we had experience of the weakness of a national power which could not enforce its laws directly upon the people of the States. One, therefore, is meant to frame a Nation, the other to organize the States; but both were carefully limited, the one in the interest of the people and the States, the others in the interest of the people alone.

But neither Constitution was or is a mass of dry bones. The very definition of a Constitution is—the expression of the peo-

ple's liberties; and both Federal and State constitutions were devised to secure this; but the one, rather political liberty, in and from the government at Washington; the other, rather personal liberty, for the people themselves and their possessions at home. Remember, again, the two great differences we have made from the English Constitution; first, the separation of the powers, and second, the subordination of the government and even of Congress or the State legislatures to the permanent will of the people as expressed in a written document which they alone could alter. And this is the great difference between English freedom and American freedom to-day. Under the English Constitution the House of Commons *is* the people, is the sovereign; anything it does is right, constitutionally speaking. With us, not Congress, not the legislatures, but the people remain sovereign. We never have parted with our sovereignty. Our legislatures, State and National, merely represent the people; and that in a carefully delimitated scope of authority. If Congress or a State legislature transcends that authority which they derive from the peo-

ple, or when the Executive does so, even the President of the United States, the courts are bound to take no notice of such acts; not to destroy such laws, as those who would make the courts unpopular are fond of saying, but to apply, where two rules clash, the higher rule; that is to say, not the will of the present President or Congress, but the permanent will of the sovereign people as expressed in the written Constitution.

I need no apology for presenting this subject at this time. The English people, in a thousand years' experience, have found that their liberties were never so really in danger as when they knew it least, never so nearly lost as under the kings they liked best. They were in no danger from kings like John; it was from John they won Magna Charta itself. They were in no danger from kings like Charles I. They had, it is true, a big fight for their liberties then, but they were never really in danger. It was Charles's head that was. But under Elizabeth, under Henry VIII, and under George III (who, we must remember, was a very popular king in England) they lost so many of their birthrights that it took sometimes a century

to win them back. Of course it was easier for them to lose, and harder to win back, because their Constitution was not in writing, was not definite. It was always open to Henry VIII or Charles I to deny that the constitutional principle for which they were contending really existed. But the fact remains that these principles were destroyed or were surrendered or taken away from them usually when the people were of one mind with the king; usually when they themselves were willing to subordinate their liberty birthrights to the passion for equality, or to some other immediate end. And this is natural. When a people is unanimous—as we now are—on most of the things that we desire, we may carelessly adopt a means that seems to be a short cut that way, though it be destructive in later times, or in other hands, of government by the people itself. And it seems as if a portion, or a party, of our people were in danger of adopting the European view of government and of law-making—that law is a command of the sovereign, not a custom of long growth among a free people; that a legislature or a sovereign nation is, or ought to be, omnipotent; and

that whatever power a European Great Power had or has necessarily resides in our Executive or in Congress—although the whole history of our Republic is that it is the first great attempt of a free people to keep certain of such powers in their own hands—at least until they choose to give them up—and to base for all time their own national career upon undying principles, as written in those tablets wherein our people have expressed their will only to be governed and their desire that by them alone their Republic shall endure.

* * * * * *

Now I am going to take up this course in the inverse order of the title. That is to say, I am going to speak of the liberties of the people first. Broadly speaking, what are they? They may be divided into three broad streams, each one of which is contained in Magna Charta itself: The right to life and liberty—the right to property, whereby a man's liberty, that is to say, his powers, are increased—and the right to law. And I am going to take these up also in their inverse order, beginning with law:

What is the right to law? I am going to

try to define what I mean at the end of this lecture, though I shall have time to amplify it in the next; and let me say here that one great difficulty I am going to have in this course is in making you see what, in a sense, you have always seen. We are not conscious of the air we breathe; but if some Martian from another planet who got on without air, should come to us, he would be very conscious of it indeed. Now the right to law is like this. The right to law, as known to Anglo-Saxon peoples, is something which has not any parallel in any other country in the world and which never had any like elsewhere in any time. It is utterly unknown even to such countries as Germany and France. It is so unknown that it is not even understood there except by their students; while it is hardly understood by us just because we are so used to it that we cannot understand anything else. In Germany, if anybody injures you under pretence of government authority, that is to say, if he is the Emperor, or a member of the government, or a judge, or a soldier, or a policeman, because of that fact you have no legal right to sue in the ordinary way.

The wonderful Anglo-Saxon principle, on the other hand, is and always has been, since it was re-established against the Norman kings, *that there is nobody so high as to be above the law.* If the emperor, or a soldier, or a general, or a policeman, does what you think he has no legal right to do, you can *have the law on him*—a vulgar phrase, which, like many vulgar phrases, is pithy with exact truth. I repeat that in Continental countries, to say nothing of Asiatic, there is no such thing as having the law upon a man who pretends to act under some government authority. They have a whole system of privileged law—what they call Administrative law—devised for the use of government functionaries alone. From this the plain citizens are excluded. But with us, if the President of the United States interferes with your liberty unlawfully, you can resist him, both by force, in proper cases, and always by suit in the courts. If a magistrate arrests you without proper cause you can sue him just as much as if he were not a magistrate. If a commission seizes your property, you can appeal to a jury. Every English freeman, every American

citizen, is entitled to have *his law*—to have his rights tested in his own courts—in his own courts, mind you, not in some other court in some remote place, or in some other government tribunal—this was what they dearly struggled for in England—not before a Star Chamber or a Government Board or a Royal Commission—but in the plain county common law courts—in his own courts at home, and as against anybody. He can sue anybody there, and he cannot be haled away for trial to any lofty or remote tribunal. Violation of this principle by George III is what the Declaration of Independence complained of: we were made to stand trial in England, where we could not bring our witnesses, or have the judgment of our neighbors. This principle—the right to law—equal law—was thoroughly established back in England as early as the reign of Saxon Edgar, re-established under Henry II, and is the cardinal difference between the rights of an English citizen and those of other countries. We have the right to law, and the law against anybody; they have no right to law against the government or those in authority.

This is a thing which Continental people cannot understand and which Americans or English, travelling in Continental countries, have always been so full of that it brings them into difficulties. That is to say, if a Frenchman is arrested by a man in uniform, the last thing that would occur to him is the notion that he has any right to resist or to make question. At most he may humbly ask what his offence has been. An Englishman or an American, on the other hand, when his personal liberty in any way is interfered with by anybody, whether a soldier, or a policeman, or a general, or a judge, wishes at once to know, what for? and he has the right to know, what for! and to test it in his own law courts. And that permanent and universal right to law, as against anybody, belonging to everybody, is the first and almost the greatest of the people's liberties.

And now, what is this law? and this brings out another fundamental difference between Anglo-American and European freedom. The English notion of law is diametrically opposed to the Continental, Norman, or Roman notion—as different as

black from white, or as sound from sight. The two conceptions of law are so different that there really is almost no relation between them—and asking you kindly to remember this difference, I will close with it. In brief, the English notion of law is the custom or usage of a free people, not originally expressed in writing, and not commanded by anybody except, possibly, the people themselves. The Continental notion, which was the Roman notion and hence the Norman notion, is the command of a sovereign to his subject, necessarily, therefore, written, and made new by the king. It is created by the government, to whom the people are subservient; not born of the people, of whom the government itself is the creation. It may bear no relation to custom or usage, or past history or even common sense. It is an order, as from a master to his slave. English law—Saxon law—on the other hand, is the usage that a free people have had, a matter of custom which everybody is supposed to know, and which, in theory at least, has lasted for all time, something like a law of nature. It is not commanded of you by anybody, in

original theory; it is simply that code of customs by which your acts are judged and which may enable you to take the law into your own hands—for this was the original remedy. That is to say, in the year 600 or 700 there were certain cases, certain offences, which put a man *out of law;* that is the origin of the word "outlaw." Thereupon you could kill him, or avenge yourself on him, as the law allowed. If a man took your cattle, or if he injured your person, you had the right to avenge yourself upon him to a certain definite extent, ranging all the way from killing him, down through personal chastisement, to a mere money fine. You executed the law yourself; or your neighbors helped you. It was not done for you by a king. Later, as civilization improved, it was done for you by the whole people, through their courts; originally by your neighbors, witnesses, who stood by you in surety.

This difference is so radical that we must never lose sight of it. English law, American law, is in theory the established customs of a free people. All other law in the world is the order of a sovereign to a subject.

Under the Norman kings, it is true, writs were brought in the name of the king, "We, John, command you," etc., but this was only their formula. Writs in our States run in the name of the people; for instance, "In the name of the people of the State of New York, by the grace of God free and independent." When a trespass was committed in Norman England, it was claimed to be committed against the peace of the king, and so it is termed in the law process still; with us, it is against the peace of the people. The attempt of the Norman kings to introduce European notions of law, Continental notions of royal authority, was successfully resisted by the English people in the first two centuries after the Conquest, so that in substance their law is the same as ours; but the effort of the Norman kings to introduce Continental ideas remains in the words that I have quoted—"against the peace of the king"; and suits are still in theory tried *coram rege*—before the king as the fountain of justice. Stubbs tells us that in a sense the great struggle of the English people under the first Norman kings was to establish that the peace of the realm was the

peace of the people and not the king's peace. Not a mere phrase, you see, but a very real meaning. Is it the government that is sovereign, or is the government but the servant? They struggled successfully; and all vestige of the Norman attempt to foist European ideas of law and government upon the English people has been swept away, with the exception of a few mere forms. We shall find the same thing when we come to law-making. Under European theories the law is made by the king, as I have said; it is the order of the Crown to the subject. Under English theories, it is made first by the whole body of the people, then by their representatives in Parliament. The Norman kings insisted on their royal form, and every act of the British Parliament is still signed "The king so wills"; but Parliament or the people very early got the substance back, and established their right to make the laws themselves. It is characteristic of the English people not to care for forms provided they get the substance. So the first aspect of English constitutional history since the Conquest is the effort of a free people to re-establish two ideas—the right of everybody

to law, and the right to law as it was in the time of Edward the Confessor; that is to say, to the customs of the free Saxon people and not the orders of a feudal lord. And every Norman king after William was made, on his coronation oath, to promise this—the laws of Edward the Confessor—until Magna Charta came. After that they promised to respect Magna Charta instead.

And now the reason why we had to have written constitutions, not unwritten as in England, is because with us the people is the sovereign, not, as in England, now the House of Commons and formerly the king; and our legislatures cannot make any kind of law they will, but only such as the people have chosen to allow. When you have the people sovereign, possessing all powers and only parting with such of them as they choose to their own legislatures or to their own executive, you see it is necessary to have a written constitution in order to make clear just what powers the people have given away. Without a constitution, our legislatures would be, like the English Parliament, omnipotent; just as without a constitution the English king would be omnipo-

tent. The one end and aim, therefore, of a constitution is to protect the people's rights, both the rights of the whole people, or any part of the people, or even of one man as against the people, in such cardinal rights as by our constitutions he is declared not to have given away; to protect them against either king or legislature. This is constitutional government. The object of *republican* government is to enforce the will of the majority; the object of *constitutional* government is also to protect the rights of the minority; to guarantee to each and every man, to every class, the essential rights that he must never part with. And it is those cardinal rights, the liberties of the people, which form the first subject of these lectures, and the first, and in some respects the greatest of them, is this right of every man to law.

## II

## CONSTITUTIONAL RIGHTS PECULIAR TO ENGLISH AND AMERICAN FREEMEN

OUR Constitution adds to the English two great principles, the separation of the powers of government so that the same man or body of men can never both make the laws and administer them, or administer them and judge those who break them; and that our people are protected not only from the Executive power, but from reckless or unjust legislation, especially by the National government; by defining in a written Constitution just how far that government may interfere with the people's domestic affairs, and leaving the determination of that question to the United States Supreme Court. And it differs from it in the creation of two governments side by side, the National government to protect and administer the affairs of the Nation—not a mere league or federation, as in all other

historical examples, but with laws and courts working from the centre at Washington directly on the States and on the people—and at the same time carefully retaining the State governments to control substantially all relations of the citizens among themselves, to protect their lives and liberties, regulate their rights of property and both raise and expend the money taken from them by way of taxation. For, remember, the National government was practically given no power of imposing taxes directly on the people, and this alone would indicate that it was not supposed to concern itself overmuch with their domestic affairs. Our written constitutions express the permanent will of the people, while our laws, our Acts of Congress, or our State statutes, are merely the opinion of a present majority of their representatives; and in this country the people are sovereign and not the Legislature, as in England, or the Executive, as in European countries. A wonderful self-restraint was shown by our Constitution makers when they made ours a protection against our own legislatures as well as the Executive; an enlightened jealousy of too much government of

any sort, of the Federal Congress because it was remote and, as they feared, undemocratic, and might grow too powerful, so as to take the liberties away from the people or from the States; and of our State legislatures, which had exercised, during the Revolution, indefinite powers, when they put restrictions in the State constitutions limiting them also.

Now this jealousy has not decreased, but rather increased as time goes on. The later State constitutions, especially those of the far Western and Southern States, most notable of all, that of Oklahoma, increase very much the number of these restrictions; so that there is not to-day in the Union probably any State whose legislature has so much power as that of the State of Massachusetts, while in these newer States their wings are clipped so much as almost to take away their character of representative government. Still more, of late, is this being done where, as in the newer Western States, by the initiative and referendum, the people are allowed not only to make laws directly without the intervention of any legislature, but to have a veto whenever they demand it on the acts of the legislature itself. On the other hand,

I suppose the fear of the powers of the Federal Government has, on the whole, decidedly decreased in the one hundred and twenty years since the Federal Constitution was adopted. The reason for this was, of course, the Civil War, and the issues which led up to it; which showed conclusively to all of us that the people of the United States must be considered one nation, and that the government must be truly national and not merely a federal compact. Still, the Federal Government, as such, has no direct power over the States, except in the one instance of their failing to maintain a republican form of government. Nothing has happened in that particular to alter the Constitution or our understanding of it during the last hundred and twenty years. The term "States' rights" is a misleading one to-day, because, as a result of the War, we are apt to think of it solely in connection with a State's *right to secede*. The object of the Civil War was to settle this one point.

A State has no right to *secede*, except in one instance. Oddly enough, no one appears to have noticed this. Just as the United States Government may interfere if

a State does not keep up a republican form of government, so a State may get out of the Union under the terms of the Constitution itself, if it be ever deprived of its two Senators in the Senate. All other rights of a State—except secession from the Union—all other rights of the people, remain as they were; except only that the States are now expressly prohibited from making laws aimed against the negroes. It is still true that nobody is with us omnipotent, neither the legislature, nor the army, nor the President. Universal power is placed back in the lap of the sovereign people itself, as it was a thousand years ago, before William the Conqueror was born. We are, in a sense, more English than the English. We have absolutely gone back to primal Anglo-Saxon principles.

We have already discussed the people's liberties and observed that they might, for convenience, at least, be divided into three general fields—rights to law, rights to liberty and rights to property. All this was clearly expressed in Magna Charta, though I warned you against the mistake of supposing that they existed there for the first time.

Magna Charta itself is, and purports to be, but the recognition by King John of the peoples' liberties as they always existed. It begins with the statement that it is made by the advice of his people, and goes on with the words, "We have by this our present charter *confirmed*"; does not even say, *enacted* or *granted*. I then took up the Right to Law, and tried to show you how important it was, although so familiar that we almost forget to think of it; and how unusual it is in the science of government; how it exists with none but Anglo-Saxon peoples. The right to law, in other words, not only protects one man from another, but it protects any man or class of men, even the humblest, from the most powerful, or from the government itself, minorities against majorities, individuals against the government. For that reason no officer, not even the President, or the army, is placed above it. To take an illustration: you may remember that curious story in a German city a year or two ago, where a crook, having borrowed or stolen a captain's uniform, marched into a considerable town, ordered the first company of soldiers he met to follow him, went

into the town hall, ordered the mayor and council to hand him over the money that was in the treasury, and walked away with most of it. It never occurred to anybody, not even to the mayor of the city, to raise any question as to this proceeding. The uniform was sufficient and covered any act. It was only when the unsuspecting mayor went to Berlin that the fraud was discovered. On the other hand, take another example here in Boston: in a time of riot —in a time of real disorder—a company of soldiers on State Street was ordered by the captain, in order to protect themselves against attack to fire on a mob. They did so, and some of the mob were wounded or killed. Nevertheless, and to the surprise of nobody, not even King George himself, who was nevertheless not very fond of Boston at that time, the captain who gave that command was promptly tried for murder.

This suggests the next point peculiar to Anglo-Saxon liberty, and that is that there is only one kind of law—the common, ordinary law of the people's courts. We have no separate law for government, no administrative law, no martial law. People

talk about martial law, and martial law does exist or may exist in any country but England and the United States—never with us. That is another of those fundamental truths very commonly lost sight of by us and by our newspapers, who all the time talk glibly about martial law as if such a thing could exist in England or our own country. That was the great complaint against Charles II, and is the thing most spoken of in the Bill of Rights given by King William, that the habit of Charles was to try people by martial law contrary to the laws of England. In an *enemy's country*, in *time of actual warfare*, there may be such a thing as martial law known to English courts; although even that is not really law, but just the will of the commanding officer. But in no time of peace and in no domestic State, can there ever be, lawfully, martial law.

Even for the government of the army, to establish a military law to control the army and navy, they have, under the Constitution of England, to make a new act of Parliament each year, and in the same manner in this country our Constitution

forbids any appropriation of money to support the army for more than two years. Military law, you understand, is the law which governs the army and perhaps also the militia when in actual service. There must, of course, be something of this sort; but it is not at all the same thing as martial law, which means military rule as applied to the free people of the country. United States soldiers in San Francisco, United States soldiers in Pennsylvania at the time of the late coal strike, whenever they caused the death of a human being, whether in self-defence or not, and whether in protection of property or not, might be, and usually were, duly and properly tried for murder. Therefore, the army and all that it means, military system, militant civilization, is not ours. The complaint of standing armies was first made in England under the Stuarts, and they never had any before that time; the Petition of Rights addressed to Charles I makes much of it, and the Bill of Rights as finally granted after the English Revolution by King William expressly says that "the raising or keeping a standing army within the kingdom in time of peace, unless

with the consent of Parliament, is contrary to law."

The other distinctive thing about law in connection with Anglo-Saxon ideas of liberty is that it must be the people's law and the law of nearby courts; it must not come, save where absolutely necessary, from a distant and remote place; nor must people be required to go to that distant place to be tried. This is the distinctive achievement of the first two or three centuries after the Conquest. They won back the notion of local law, local self-government, and the right to be tried by their neighbors in nearby courts. One of the grievances stated in our own Declaration of Independence was the practice of King George III of transporting Americans beyond the seas to be tried for offences; and it also complains that he "has kept up standing armies in times of peace without the consent of our legislatures, and has affected to render the military independent of and superior to the civil power," and as bearing particularly on the right to law, note that it also complains that he "has made judges dependent on his will alone for the tenure of their offices and that he has

called together legislative bodies at places distant from their homes." Lastly, I tried to make it clear to you that our law itself differs world-wide from Continental or Roman law, in that it is always in theory the custom, that is, the will, of the people, and not the command of a sovereign to a subject. Finally, the reason that our Constitution was written and not, as in England, unwritten, is that with us the people are sovereign, and therefore must put in writing the regulations which they wish to impose on their own legislatures.

Closely connected with the right to law, is, of course, the right to liberty, the one right standing guard to the other. Now what is this right to life and liberty? The right to life, of course you understand, and that right at least is shared by the people of most civilized countries. Even the government is only allowed to take away a man's life under due form of law. But the word liberty is of much wider scope. It means, first and foremost, the right of a man not to be restrained, not to be put in jail, not to be confined. That, of course, you understand also; but here again we find the same

world-wide difference between Anglo-Saxon notions and Continental notions of a man's rights. When with us a man is arrested by another man, he brings an action for false imprisonment. If arrested by a soldier or policeman, he not only may do that, but he demands to know at the time what he is arrested for, and asks to be set at large or released on bail if arrested for a bailable offence. And the law is so jealous of this right that it has steadily guarded it in a thousand years in this most simple and direct form; a writ corresponding to *habeas corpus* is mentioned in Magna Charta, which says that it shall not be denied, and shall be given without cost; and the clause just before that says that no writ shall in future be issued so as to cause a free man to lose his court. That is to say, to take him away from his local jurisdiction and take him before the distant kings. Now, there are practically only three roads of tyranny, one to destroy a man's life, another to take away his liberty, and the third to deprive him of his property; and the second is the more usual and effective one. For six hundred years the kings, Norman, Tudor and Stuart, en-

deavored to get around this writ of *habeas corpus;* to arrest people and confine them or restrain them without trial and without telling why. As a result the great Habeas Corpus Act was passed after the English Revolution, which made this weapon of liberty complete. Not only must the writ be given at once and, as a matter of course, gratis, but it had to be open to everybody and must be granted at any time, by any judge, day or night, in vacation or in term time. The person or power restraining a person of his liberty must produce him within a short time and the prisoner be discharged within two days unless it is shown that he is under indictment for an offence not bailable.

Now even to-day—and I have made careful inquiry—I cannot find that there is anything corresponding to this in Germany, France or any Continental country. There, a man may not be deprived of his liberty by another individual; but if he is taken into custody by a Government, in any of its capacities, it is not for him to reason why.

But the right to personal liberty is much more than even this. It includes also the

constitutional right of a man to go and come, to emigrate, and, if a citizen, to return; and, finally, the right not to be banished. It was early established as an English principle, and it is so with us, that banishment from the country cannot be imposed for any offence. On the other hand, a man may not be restrained if he wishes to go out of the country; and in the United States he has the right freely to move from one State to another. This right is so jealously guarded that in the Supreme Court of the United States a law of Nevada was held bad which merely imposed a tax of one dollar on stage-coach passengers who might pass through the State. The right of being unconfined when you were still, and of moving about freely when you wished to, even to the extent of leaving the country when you like, is, therefore, one of our essential liberties.

And now there is another great difference between English and American liberty under Saxon law and the liberty of other peoples, a fundamental difference between the entire law system of the English people and of all Continental peoples, which began at the

very beginning, and departure from which is still a legitimate source of grievance, perhaps, among our laboring classes. Too much has, perhaps, been made of the phrase "government by injunction." I have no desire to attack the valuable procedure of courts of equity, a very necessary method of ordering people to do or not to do certain acts. Still there is a legitimate objection to stretching this great power too far, which is evidently vaguely felt by large classes of our citizens, but no one, so far as I know, has ever noted that it goes down to the very root of the theory of English liberty under the law. Now, if I can only make clear what I mean by this difference in the few minutes which remain to me, you will understand what is, perhaps, the greatest difference of all between our notions of what law ought to do for and against the individual, and the notions of all Continental countries.

You remember that I said that the Continental notion of law was the order of a sovereign to a subject, coupled with the threat of punishment if he did not obey. In other words, the Continental notion of law is to make a man do something or not to

do something, and this is the Oriental notion of law also. You have only to read any tale in the Arabian Nights to note, what still remains true of all Asiatic peoples, that the caliph or the shah or the grand vizier, when one man complains against another, if he take the side of the person complaining, at once orders that other man to do something or to refrain from doing something. This is ingrained in the whole notion of Oriental and even of Roman law. Yet it is just one of those basic facts which may come to you with some surprise when I tell you that this idea has absolutely no place in Anglo-Saxon law or the common law of England or America. The common law, as we lawyers say, speaks only in damages. It has no notion of ordering a free man to do something against his will. Now, this I know may surprise you, but it is the exact truth and not even an exaggeration. Moreover, it dates from a time where man's memory runneth not to the contrary, and still remains as true as it ever was of the common-law courts to-day. If one man injure another in civil matters, if you win your case in a civil action, the defendant—the other

man—is not *made to do* anything. He has only to pay you a certain sum of money. In the same way, even in criminal cases, cases brought by the State against a person who has broken a law, if a man is found guilty, he is never ordered to do anything, not even to make affirmative restitution, as might be the case in an Oriental country; he is punished, either by death or by imprisonment, or, again, made to pay damages in the nature of a fine. In the very first glimpse we have of the Saxon peoples in England we find the same system prevailing. The notion of the fine, however, was carried to an extent that would possibly seem absurd to-day, for then every man had his price literally. That is to say, the life of every man was worth a certain definite sum. A member of the royal family was worth ten times more than a baron; the life of a baron, ten times more than an ordinary freeman and so on. If a man was murdered and not avenged by his kindred—which they had a perfect right to do—he was liable to pay a fine to the kindred of the person slain, and this principle went down through minor criminal offences. What the

law did was to determine what actions were right, and the nature and amount of the penalty for such as were wrong. It never ventured to order a man to do any definite act. That notion was altogether too foreign to the ingrained ideas of personal liberty which characterized the English people.

Now, that principle is just as true to-day in 1907 as it was in 707; and when an injunction or an order of a court of chancery is served on an American freeman, he resents it just as much as his ancestors would have done, though he does not know how much historical reason and justification he has for his dislike of such process. For instance, one of the great grievances in the railway strike of 1903 and in the recent coal strike of West Virginia was that judges ordered men *not to quit* their work—which amounts to very much the same thing as ordering them to go on with it. Our common law does not recognize the right of anybody, judge, officer or United States President, to order a man to work if he does not wish to, or, indeed, to order him to do any definite act or thing. If he does wrong, he

is liable under the common law for the damages caused by his act, liable not only to the person injured, or, if the offence be criminal, to a penalty or a punishment imposed by the State, that is, by the whole people in their courts. But he is not supposed to be ordered by anybody to do a thing that he does not wish to do, however harmless it be, or to abstain from any act that he wishes to perform, not in itself criminal or unlawful.

Now, how did this un-English right of the injunction or the court order get in? It is just an example of a growth upon the English system of ideas brought over from Normandy, and enforced first by Norman kings and then by their chancellors or chief justices. It is really a Continental or Roman law notion, and repeats, in last analysis, the power of a king to order his subjects in any way he will. At first, in very early times after the Conquest, this power was exercised direct by the King or by the King and Council. He very soon got into the habit of handing it over to his high judicial officers, one of whom, known then as the Justiciar, was given this jurisdiction

rather in criminal matters, while the other, known as the Chancellor, was given it in civil affairs. From the Justiciar historically grew the famous court of Star Chamber, which was abolished after the English Revolution, and which exercised the royal power of the Crown to try men for their actions and order their doings in Crown cases, that is, in criminal matters, or matters supposed to be criminal. From the other grew the Court of Chancery, which existed in theory to mitigate the rigor of the common law or to supplement it where inadequate. This part of its jurisdiction is, of course, sound and good; but it also shared this extraordinary un-English, Norman power of ordering a free citizen to do something that he did not wish to do; and that power is found amazingly convenient in modern times where it is desired to control the actions of large bodies of men who individually, perhaps, are not responsible in large money damages, or when it is either inconvenient or impractical to exert the remedy of the common-law damage suit in the courts.

Under our industrial system a state of

things has developed where the vast bulk of business in this country is done by persons acting together under the name of corporations; and under our Federal system, under the Federal Constitution, where any one of these corporations is chartered in a different State from that where the dispute arises or where its adversary lives, that corporation has the right to take the litigation and the power of regulating its affairs away from the local courts—away from the State courts sitting where the people live who are most directly concerned—up to the United States court, probably, in the first instance, some distance away, and ultimately, of course, to the Supreme Court at Washington. Under the recent proposal of having all corporations which do interstate commerce business (and nearly all corporations do some) chartered by the United States Government, all litigation of any sort in which they are concerned would always be taken away from the State courts, from the local courts, where their mines or their mills are situated, and carried to the Circuit Court of the United States or to the Supreme Court at Washington. It has al-

ready grown to be the practice of most companies not to rely on the State courts or the local courts near where their works are, which, with or without reason, they distrust, as being more in sympathy with the people, but to go straight into the Federal courts and into the Federal Courts of Chancery under this chancery jurisdiction we are discussing, whenever they can; and instead of suing in damages or using the local police protection, getting an order from the Federal judge, addressed to the whole body of their employees, or even to all the world, ordering such people to do or not to do what they wish or what they complain of. This order, as you know, is termed an injunction—originally the highest writ of the royal prerogative in England, but now given to all Federal judges of any description, and even to many judges of lower courts as well. This is not the time, nor do I know that I shall have time further, to go into this matter. The only point from which it interests us to-night is that it shows up this fundamental difference between English theories of law and Continental ones; that under the English system a free man is never to be ordered

by the courts to do something, but only to stand by the consequences of his acts in damages, if he ought to pay damages, or be imprisoned, if he ought to be imprisoned; while under royal Norman ideas this high power of the injunction writ or the mandamus grew from the old power of the Norman absolute monarch to order his subjects to do certain definite things or to act in a certain definite way. Under it, as you know, if a man disobeyed, he was punished summarily, without a trial, in what we call contempt process; this also, therefore, being foreign to ordinary English notions of procedure, which always involve a hearing and a chance to produce witnesses and a jury trial.

Chancery powers are most valuable, and it is in my opinion a great mistake to do away with them, as they have practically done in the new State of Oklahoma. Nevertheless, if abused, they will now, as they would have a thousand years ago, cause an English people such resentment that they will abolish the thing entirely instead of regulating it properly. The one point I now wish to make is that this is a genuine distinction; and, therefore, we may call this the third

great difference under which English notions of liberty differ from the liberty of people in Continental countries. An Englishman or an American cannot be ordered to do a thing that he does not wish to do, to carry out a certain line of action, or to perform a certain service. Indeterminate services for an indefinite time or even for a long time under the English common law were considered the same as slavery. A man is liable for the consequence of his acts, but no one can control them or direct them against his will—no individual, no officer, nor the State itself.

But the right to personal liberty is far more than this also. It includes not only the right to be free and move around, to do what one will and be responsible for one's own acts, but—and this is getting to be the most important of all to-day—it includes the right of a man to labor at any trade, to go into any business, in short, to earn his living, or to exercise his functions or faculties in any manner soever that he at any time choose without any restraint or hindrance or combination against him on the part of the State or of others. This is the great personal lib-

erty right, and the one that we are still battling over to-day, for the other two or three have been successfully established. No one seriously pretends any more to take away a man's life or personal liberty without due process of law. But the right to control a man, or to interfere with him in his business or labor, or trade, is being asserted and reasserted more and more, both by his employers and his employees, and by his competitors and by his fellow-workmen, or even by the United States or by the States. Now, let us see how those words read in the first written expression of them, that is, in the Magna Charta of Henry III and of John. John, in his charter, the earliest, uses the simple expression, "No free man shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any ways destroyed, nor will we go upon him, nor will we send upon him unless by the lawful judgment of his peers or by the law of the land"; but in the re-issue of the charter by Henry III the very significant explanation is added after the word "disseised" (which, as you know, means deprived of): "No free man shall be deprived of his freehold or of *his liberties*

*or of his free customs*," and it is no fantastic explanation but was thoroughly understood at the time that this meant also the right to trade or labor, the right to earn one's living, and the right to be protected both from State hindrance and from monopolies; and the great Coke, commenting on this clause, says that the word "Liberties" means the "general freedom possessed by the people in England, and that monopolies in general are contrary to the Great Charter." There are also other expressions in Magna Charta showing this. It begins by saying "We have granted to all the freemen of our kingdom all the underwritten liberties to be had and holden by them and their heirs forever. . . . The City of London shall have all its ancient liberties and free customs, as well as other cities, boroughs, towns and ports." This particularly means, rights to a livelihood, rights to labor and to trade, and also the rights of the Guilds, or, as we should say, trades unions, which already existed in the towns at that time. And I may say right here that there were two ways that a man got free in England: You probably know that at the time of the Norman Conquest

there were still some slaves—25,000 are recorded in Doomsday Book—and several centuries after they were called villeins, that is to say, farm laborers who were attached to the land, not paid in money wages, and who were not allowed to leave their master's farm or seek service elsewhere. This class was very numerous indeed. Now these two ways by which a villein or slave could always get free in England were, first, by owning land; and secondly, by joining the guild of a trade, in a town, and working at it for a year and a day. In a sense, therefore, labor is the source of freedom in England; for many millions more Englishmen got free through this door than by any other way. This, therefore, is a right peculiar to American and English freedom—the right to labor or exercise any trade. On the Continent, the absolute right of a man to labor and trade was never recognized, nor the right to earn money or make a profit in any way he chose. He was not protected from the competition of the State or other hostile combinations or from monopolies of any kind; for, while the English Constitution early recognized the Guilds, it at the

same time was careful to provide that their by-laws should be reasonable and to forbid anything that was in restraint of trade. I can show you the statutes, almost as old as Magna Charta, which recite that the Guild of a certain town has made a by-law, or combined in such a way as to prevent other people from exercising their trade—and such by-laws declared for that reason unlawful. I can even show you an actual case which is as modern as the Sugar Trust in its principle; in fact it complains of the very thing that our trusts are now said to do. In 1221 the Abbot of Lilleshall went to court and complained "that the bailiffs of the town of Shrewsbury had made many injuries against his liberty in that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings,"—and he won his case. The court decided that this was what we should call a "trade boycott" or unfair competition, and against his liberties as a British subject. Now this great principle has always been law, that not only has a man right to labor and trade, but no man

or set of men can combine against him; and that there shall be no combination in restraint of trade, no agreement to restrict the output, to fix a price, or to increase a price or to injure a competitor by unfair methods. But this great principle of English freedom had been almost forgotten. And, as I told you at the beginning, these subjects we are discussing I select, not only because they are important and fundamental, but because they seem to be being forgotten to-day. Most of our anti-trust legislation was not really necessary. Indeed, we had the intelligence never to pass any anti-trust statute in Massachusetts. We knew that the law was there, if people would only enforce it. I make bold to say that not a single case has been decided against a trust which might not have been decided equally well on common-law principles.

But now let us take the other side of it. We have been talking about combinations of capital in restraint of trade. Now let us take combinations of persons to interfere with a man in his business and regulations of the State to prevent it. These, as I have

said, were always unlawful in England, but not so on the Continent. The Guilds in England, while in many respects favored by law, were never allowed to control other persons' liberties. In Germany, and particularly in France, on the other hand, they grew so arbitrary and so powerful that they overshadowed the industrial world. It was impossible for a man to get work at a trade before the French Revolution without the consent of some Guild, and these Guilds, mind you, had long ceased to be the unions or combinations of the workmen themselves; they had grown rich and aristocratic, and very often did no labor at all, were not journeymen, but mere combinations of employers. The result was, that they earned the deserved hatred of the people; and Carlyle will tell you that the day of the French Revolution which announced the absolute abolition and destruction of all trade Guilds was welcomed with bonfires and the ringing of bells throughout France. Labor had at last become free there—in England it always has been.

And so with us the Constitutions of North Dakota and Utah declare that "every

citizen of this State shall be free to obtain employment wherever possible, and any person or corporation maliciously interfering or hindering in any way any citizen from obtaining or enjoying employment already obtained from any other corporation or person is guilty of a misdemeanor." In Montana and Wyoming "The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his services and to promote the industrial welfare of the State." In Louisiana "no law shall be passed fixing the price of manual labor." These State Constitutions well express the Anglo-Saxon idea.

## III

## ENGLISH LIBERTY AND THE FREEDOM OF LABOR

THE general right to liberty includes the right not to be punished by maiming or disfigurement; the right to the liberty of one's motions even to the extent that one may freely enter or leave the country; the right not to be banished for any crime. All these rights are simple enough to understand and have been established in many centuries. No one seriously questions them any more, though there has been an occasional attempt to banish convicted criminals from the States of the Union in which they reside. The Governor of Arkansas is said to have pardoned such a man on condition that he come to Massachusetts. The new Oklahoma Constitution provides, however, that no one shall be banished from the State for any crime or under any legal procedure—except, of course, lawful

extradition under the United States Constitution. And the great weapon of protection for this part of the personal liberty right is the writ of *habeas corpus;* which exists to the full extent in no other than English-speaking countries.

No court and no sovereign, under the Saxon theory, can *order* a free man to do anything against his will, or even punish him for not doing it by any law that he or his representatives in the Legislature have not consented to. The Norman process of issuing orders from the King or his Chancellor resulted in "Prerogative writs," equity jurisdiction and the doctrine of specific performance, that is, requiring a man to carry out his contract in terms, not merely to pay money damages for breaking it; in Mandamus, Injunction, the order of the Crown or the sovereign State to a man to do or refrain from doing some act apprehended—this led to contempt process; that is, the punishment of the parties so ordered for doing or not doing the act complained of—the great point being that English law never speaks in terms of an order from a sovereign to a subject; but only requires a man to pay the

penalty of his acts, either by punishment to his person, if a criminal act, or by damages, if in a civil court. Under the accident of our double sovereignty, State and National, and a course of events by which the great bulk of our business has come to be done by corporations chartered by the States, and not by individuals, and the fact that when a suit is between citizens of different States, either may carry it into a Federal court, it has become the usual practice of corporations when complaining or complained of to withdraw the litigation from the local courts to the Federal courts, and so ultimately to Washington; and instead of appealing to the local police authorities, or requiring the State officials to maintain the peace of the State, it is found a more convenient and certain remedy to go into a Federal court for an injunction and then, under this contempt process, secure the imprisonment of anyone who disobeyed it. The abuse of this remedy has led to the demand for jury trial in all cases of contempt of an injunction, which seems to be going too far. Nevertheless, the objection is an old one. For instance, under Edward

III, as early as the year 1331, we find a statute restraining the chancery jurisdiction and forbidding the arrest or conviction of a man or the forfeiture of his property without a jury trial in a common-law court.

The one thing, however, which the injunction cannot do is to order a man to carry out a contract of personal service. Anglo-Saxon notions of individual freedom prevailed over the Norman Chancellor in this one exception; so that to this day a man who breaks a contract for personal service is only liable in damages. He cannot be forced by any court to render the service; and in the same way indefinite service for a long period of time is, under our ideas, a contract of slavery; and it may not be enforced in any court.

An even greater side of the personal liberty right, more important at least to-day because more likely to be denied, is the right to labor and to trade; to acquire thereby property, to exercise one's faculties in any lawful way, to increase one's comfort and one's powers by the acquisition of wealth or the exercise of property rights. This right was recognized in the express words

of Magna Charta, where it says that "no free man of England shall be deprived of his freehold or of his liberties or of his free customs"; for this expression, under the law of the time, was understood to mean the right to labor at any trade, to earn one's living in any lawful manner; and the right to be protected in this from any hindrance of others, either physical or by contract in restraint of trade; from combinations of the Guilds, or from monopolies created by the State. All the cities, boroughs and ports of England were to have all their ancient liberties and free customs. A man who labored at a trade for a year and a day was necessarily a free man, in England, even as early as the Norman Conquest, although he had been a slave or a villein before. The Guilds of a trade, while they were recognized and expressly protected in their chartered liberties, were always restrained from creating by-laws in restraint of trade, or which should lead to combinations against others in the same trade, or of other trades, not to buy of or sell to them—what we should call a boycott.

In 1305 we find the first statute against

conspiracy. In 1360 another statute, of Edward III, for the first time allows work to be done *in gross*, that is, by contract. Before that, under the statute, all laborers had to be paid by the day. And it declares void all alliances and covins between masons, carpenters, thatchers, etc., or between Guilds, chapters and ordinances. Repeated statutes of this sort were passed, until, in 1436, we find the exact modern words used, "All by-laws in restraint of trade are declared unlawful and void. No guilds nor corporations shall make unlawful ordinances as to the price of their wares for their own profit and to the common hurt of the people." This sort of statute is repeated many times, and in 1503 we find a new provision that the by-laws of the Guilds restraining suits at law are unlawful; that is to say, if a man is deprived of his rights in a trade union, no by-law of the union may prevent his appealing to the courts.

The right of a man to get fair wages for his labor was, however, denied for many centuries in England. The principle that a trade combination or an individual has no power to make undue profits, could not

corner the market or buy up any necessary of life and then hold it at an exorbitant price, was very early established, indeed quite as early as the twelfth century, and it had probably been law before that; but for many centuries also the attempt to regulate wages was made in England, and it succeeded in all Continental countries. Wages there were fixed, if not by the employer, at least by some functionary of the State in his interest. This had probably not been the case in England, as to free labor; but early in the fourteenth century the plague of the Black Death nearly depopulated the country, and after this labor was so scarce that in 1349 the first Statute of Laborers was passed, which required everybody to work for the old wages, that is, the wages before the Plague; and in the following year this was fixed by law at one penny a day for common laborers, three pence a day for mowers, two or three pence for carpenters, three or four for masons, one-half a penny for servants, and so on. It is probable that these wages represent something like seventy-five cents a day in purchasing power. At that time the Black Prince, the head of

the army, was paid twenty shillings a day; that is to say, about eighty times as much as a skilled laborer—less in proportion than we pay the President, but more than we pay governors or the judges of our Supreme Courts. This notion of fixing wages had now got a firm hold. It is repeated over and over again by statutes in the following two centuries. Able-bodied laborers were compelled to work; and they were compelled to work at those prices which were declared lawful. A century later they did give up the attempt to fix the exact price by law, but provided that the wages of artisans and laborers should be fixed twice a year by the justices of the peace. This law in theory existed at least until Elizabeth, and was not expressly repealed until 1869. The fight of the working classes to prevent the fixing of their wages by law was waged for many centuries and had many consequences. One of the most important of these is that in England a strike was, for many centuries, considered an unlawful conspiracy. It is easy to see why; when the rate of wages was fixed by law, and a penalty imposed for paying or demanding more, the combination to

obtain more became an unlawful conspiracy; that is, a combination with an unlawful end. This notion of the illegality of strikes only disappeared from England in the first quarter of the nineteenth century. Fortunately, we never had it in this country; nor did we ever consider in the United States or any of them, at least until very recently, that the wages of labor could be fixed by law. In the Louisiana Constitution and one or two others there is an express provision that the rates of wages never shall be fixed by law. A recent amendment in New York, however, requires that the State or any municipality—town or city, or contractor on public work—shall pay the same wages that are usually paid in the same trade at the same place and time.

The same fight for free contract was carried on in France and other countries in vain; wages fixed by the State, employment monopolized by the Guilds, existed and continued to exist until wiped out by the French Revolution. We now, therefore, have to add to our liberty right of free trade or labor, the right of free contract: that is the right of a man to demand such wages as he can

get and to refuse to work for them if not satisfied; the right in the same manner to work as many or as few hours as he choose, which is practically the same thing; and the right of free employment, that is, the right not to have any trade made a close corporation. Hours of labor were curiously regulated in early times. Under Queen Elizabeth they were fixed, between March and September, from five A.M. to seven P.M., with two and a half hours "for meal times and drink times and two and one-half hours for sleep"; from September to May the hours were from dawn to sunset—and this is still, or was recently, the law in the State of Georgia. Wages were still to be fixed by a justice of the peace. No one might use any manual art who had not been apprenticed to the same. Masters were prohibited from discharging servants before their term without reasonable cause or a quarter's warning; and no servant could be hired without a testimonial. I have no time for more of these things; suffice it to say in brief that the conditions and rights of labor were for several centuries attempted to be regulated by law. As a consequence of

this, combinations of workmen to alter wages or conditions of employment were thought illegal. But this latter notion never existed in the United States. And, finally, the whole attempt at regulation by law was given up, and the entire liberties of the laboring classes won back, even in England, early in the nineteenth century. One sometimes wonders whether our labor unions already wish to return to it.

Monopoly had much the same course, but was much more quickly got rid of. It was always abhorrent to English notions; and there had been no event like the Black Death, no pretext of necessity, which caused State interference with the right to free trade in this particular. There probably never had been any legalized monopolies in England until about the reign of Queen Elizabeth. Anxious to raise money for her wars, she discovered the principle of granting patents; that is to say, giving licenses to a man or a company to tax a certain trade or business, or to deal in a certain commodity, or manufacture a certain article, with the implied promise that no one else should be allowed a similar right. In 1606

patents began to be granted for the exclusive sale of articles, even which were not inventions, but it was only twenty years later (1623) that the great Statute of Monopolies was passed, prohibiting such monopolies both granted and to be granted, giving remedy in double or treble damages to anyone injured—just as we to-day under the anti-trust acts—making exceptions only of the charters to trade Guilds, tavern licenses and patents for inventions and copyrights. This, with the exception of the double damage clause, was probably the common law; but the beauty of the statute was that it prohibited the King from dispensing with the common law by granting such licenses. Monopolies in England had a very brief sway, therefore, under the law; and it is doubtless one of the constitutional rights of an Englishman, and hence of an American, to be protected from them. I need not point out that such was not the case in Continental countries, where monopolies have always been part of the very fabric of society. State monopolies, the most dangerous kind, exist in all European countries to-day. In Austria, Italy, and, I think, France, the

trade in salt and the trade in tobacco is a State monopoly; and in nearly all countries individuals or bodies of men were given exclusive charters, either by the State, or by the town or city, to exercise their industry. Such is the case in all South American countries—you can do almost nothing without a State license—a "concession." In this country and in England, however, monopolies created by the State or Nation are just as unlawful as any other kind. A man has the constitutional right to exercise any trade, go into any business, and not to be competed with by the State, or have other individuals or corporations favored by special license or privilege at his expense. Abstractly stated, this means that individualism and not socialism is the principle on which our government is based. Socialism of any kind has never been recognized or permitted under English or American law. The moment any statute or any combination was perceived to embody a socialistic principle, it was held unconstitutional, or unlawful, as the case might be. This is so fundamental that there are, even in all our forty-six States, only three cases in which,

so far as I know, the principle of socialism is discussed abstractly. Some ten years ago a Texas judge refused to naturalize an immigrant who was a professed socialist, on the express ground that the Constitution of the United States required a republican form of government; and that this is not consistent with socialism. There is no express provision on socialism, using the word, in the Constitution of any State. The new Oklahoma Constitution declares that the right of the State to engage in any occupation or business for public purposes shall not be denied or prohibited, except that it shall not engage in agriculture. This, indeed, is the declaration of a socialistic principle, at least in possibility, which may have caused the President to question whether it is compatible with a republican form of government. While, on the other hand, the new States of Washington and Utah expressly say that the object of government is to protect and maintain individual rights. In the older States the provisions concerning liberty and property were doubtless considered sufficient to cover this. The State of South Carolina established a mo-

nopoly in the liquor-selling business and attempted to carry on that trade itself. This, of course, was state socialism applied to the selling of intoxicating liquors. The United States attempted to impose internal revenue taxes on the State, as it would upon any other manufacturer or dealer in liquors. The State resisted payment on the ground that it was a sovereign State, hence could not be taxed, and the case went to the Supreme Court. There was a great deal of argument on the question whether a State, as such, had the right to engage in any gainful business, but the case was decided upon other grounds. And in Massachusetts and several other States the carrying on by the State or by cities or towns of gainful trades or avocations necessarily competing with the industry of private individuals has been declared unlawful and the laws permitting such, unconstitutional. You will remember the case in this State was that of Municipal Coal Yards, that is, having the city engage in the coal business, but there have been in other States several other examples. So we conclude that the right to trade is not only protected, but it is unlimited. There can

be no combination made against it, nor any privilege granted, even by the Government, which shall interfere with it; and the right to trade, as well as the right to labor, necessarily involves the right to make contracts concerning the same—which we call the right to freedom of contract.

There is another cardinal liberty right which bulks very largely in the popular mind to-day, but cannot be traced, at least as now understood, to any very early expression in England—that is the right to equality. The notion of equality was, as you know, very strong at the time of our Revolution, and still more strong in the French Revolution; and Tocqueville and others have often pointed out that in an extreme democracy it is apt to be valued more than even the right to liberty itself. In other words, democracies, and legislatures representing them, will sacrifice individual rights, and impose very tyrannous laws, in the aim of securing a fancied equality. But the very word equality appears for the first time in the Declaration of Independence, which only says that "All men are *created* equal." Equality before the

law—not equality of position and condition —was, indeed, an English principle almost as old as any that we have. In the earliest times of which we have any glimpse, in the times written about by Tacitus, the Teutonic people were divided into three classes —nobles, freemen and laborers attached to the soil—but they were probably always treated equally before the law, except, indeed, that, as I have told you, the fine paid for the murder of a man varied according to which of these three classes he belonged to, and in the same manner when they tried people by their oaths (compurgation, as it was called) the oath or testimony of a noble was worth ten times as much as that of a simple freeman, and so on: but even this inequality disappeared very soon after the Conquest, so that as early as the reign of Henry II the express principle is laid down in the most forcible manner in one of his great charters, that all Englishmen are free and shall be treated equal before the law. Another right of equality results from this very right to labor—to acquire property unmolested—that we have been discussing; that is what the President so well calls

"Equality of opportunity"; the equal right of any man to engage in any trade or business with as good a chance as anybody else and be protected from any confederation, any combination in restraint of trade, any trust, or any special privilege granted by the State or by the Nation. On this principle, also, all public service must be open to all men equally without distinction of rank or station, and all schools or other public institutions be open to everybody in the same way, or at least equal privileges provided.

Finally we come to the right of property. This is almost as old as the right to personal liberty. In fact, it may almost be said to result from it, as it certainly results from the right to labor. There is no recorded history of a time when the Teutonic (later the Anglo-Saxon) people did not recognize this right to property quite as firmly as we do to-day. The only difference was, that in very early times some of the land was held in common; not all, but some. Property in land seems to have preceded property in what we call "Personal property"; this merely for the reason that at first there was very little of the latter. A man always

owned his spear, his clothing and personal belongings. His house or hut, of course, was on his land. Other than this, the earliest personal property was cattle and domestic animals; and there is no record of a time when these might not be owned in private ownership. Our word "chattels" is doubtless a corruption of the other word cattle, for this was the earliest subject of property. There are express statutes, however, recognizing personal property long before Magna Charta; and that great document recognizes the right of property, both real and personal, in many clauses. It was not necessary to define the right to property in abstract terms. But even this is done in most of our modern constitutional documents, notably the Virginia Bill of Rights of 1776, and in the Federal and State Constitutions.

The right to property needs very little definition. It is, of course, inconsistent with any scheme of socialism or of communism. These, by the way, are not the same thing, though often confounded. Communism merely means that the institution of private property shall not be recognized,

but everything shall be owned by the State. Socialism goes much farther than this, and says that the State shall also control the actions, or the means of livelihood, of the individual. In other words, communism is merely aimed at the property right; socialism is aimed at the broader liberty right.

The individual, in England and America, therefore, has an absolute right to property, either the profits of his labor (the only kind recognized in the Oklahoma Constitution), or to property lawfully acquired in any other manner (in the Constitutions of all other States and of the Nation). And having the right to property, he has the right to make any contract, with whomsoever he choose, concerning it; either for the use of the same, or in order to acquire new property. This, again, we call the right to freedom of contract; but while the right itself is clear enough, the methods in which it has been enforced and the methods in which it has been interfered with deserve some study.

The three great principles in the English Constitution which concern property in its relation to the government are, first, that

Englishmen cannot be taxed without their consent as expressed in their legislature. In other words, the King can impose no tax except under a law passed by Parliament. The second, that the object of all levies, the end for which all moneys are raised by law, must be the general good of the people, that is, the good of the people, not of any one person, even the King, nor of any particular class, such as the nobles or the merchants. The third, also expressed in Magna Charta, is that no man's property shall be taken away or damaged, even for public uses, for the use of the State, without full compensation; and we have added to this principle that the compensation must be paid before the taking, and the amount determined by a jury. The first two principles were so distasteful to the Norman Kings that, while clear in the charter of John, they were carefully dropped out a few years later from the charter of Henry III, and it took a century or so to get them back—in the Confirmation of Charters of Edward I. This principle, that money can be only taken from a man under any law by the State or by any creature of the State, with his own consent as ex-

pressed by a legislative body in which he is represented; and the other principle, that all the revenues of the government must be collected for the good of everybody and not for any particular class, have been of immense importance in our history. They, in large part, brought on both the English and the American Revolution, and have by no means ceased to be important to-day. And our Constitution goes a step beyond the English in that it effectually denies to the Central Government any direct taxation at all.

The last of our natural rights is the right of conscience; the right to the free exercise of one's own religion, the right not to be compelled to adopt any religion, or to pay taxes for any church; and the right not to be deprived of any privilege or any office on account of one's religious sentiments. I need say no more of this. As you know, it is the very principle which brought about the settlement of our country; and although, at first, our Puritan ancestors endeavored to enforce their own religion or their own sectarian belief on others, that effort was soon given up, and the denial of any such attempt

forms one of the corner-stones of the Declaration of Independence and the Federal Constitution. This last right, you probably know, has never even yet been declared a constitutional right in England, though the political tendency for the last two centuries has been towards general religious freedom. The established church, however, still remains.

Now, in closing our discussion of these cardinal rights, the right to law, personal liberty, trade and labor, equality, property, religion, and, we might add, local self-government—I must accentuate the fact that one great principle is common to all of them. Whereas other rights given to or retained by the people under our system are matters which may be altered at the will of the majority, matters which cannot be enforced to their full extent by one individual—certainly not by one individual as against the Government—every one of these cardinal rights can be enforced just as much by the individual against a majority or even against the Government as against any other one fellow-citizen. Under our theory nothing can change or take away from an English

freeman any of these cardinal rights. Virginia and other State Constitutions say that these rights are inalienable and that government itself is instituted to secure them. They cannot be supposed to be surrendered by the people when they came into this or any government, because no equivalent can be given for them.

But, besides these natural rights, there are other constitutional rights of English freemen, many of which are quite as old, which only differ from the natural rights in that they are rather political, military, or legal, than essential attributes of human liberty. I have no desire to tire you with a full catalogue; but some of them are too important to omit. First is freedom of speech and freedom of the press, which I need not dwell upon; and (perhaps as a consequence of this) the great political right of the people to assemble and consult together; and to petition the Government for redress of grievances. Now this is a right of immense importance; and this also does not exist in Continental countries. Only last week in this very hall Abbé Klein was complaining that it was almost impossible for his party to make

effective opposition to the radicals because this right did not exist in France; and we remember the recent executions of thousands of Russian subjects for presuming to exercise this right. And even in our own country the Chief Magistrate has recently qualified with the term of conspiracy an alleged combination of citizens to oppose or prevent the nomination of a certain man to succeed him. A conspiracy is a criminal or unlawful combination. A combination of English or American citizens to nominate a certain man for office—or even to oppose the nomination of a certain man—is not a conspiracy, but the exercise of a sacred political right. Cromwell, in his later despotic years, termed it a conspiracy; so Napoleon III, who dispersed such assemblies at the point of the bayonet, and the Czar, who breaks up such combinations by imprisonment or execution. But it is one of our dearest liberties.

The right to bear arms is another cardinal right of English freemen, dating back to the days when every man might execute the law for himself, reaffirmed in later days as against a tyrannical government, while to

the Government, the employment of mercenaries—later, standing armies—is always forbidden. Standing armies were always intolerable to the English people. Even now, in England, the maintenance of the British army depends on the annual vote of the House of Commons; so with us it must be voted once in two years, or by every Congress. Yet we have recently heard from one of our generals that our imperial career may make conscription necessary—a thing never yet tolerated in England. Several States have Constitutions forbidding the employment of private companies of guards or the importation of "Pinkerton men," so-called, in times of strike or trouble. This is said to have been one of the objections of the President to the Oklahoma Constitution; but it exists in such conservative States as Kentucky. So, the early statute books in England are full of laws against "private retainers."

Of trial by jury, I need say no word. It comes under the right to law, but is separately and expressly mentioned in Magna Charta. Congress is at present withholding it from ten millions of our people in the

East.—The right to serve on juries is of equal importance. The negroes allege that they are being denied it in the South.—The right to *habeas corpus* comes under the right to liberty; that also is being withheld in the Philippine Islands.—Since Magna Charta, no man can be tried for crime unless a grand jury of twenty-three men find probable cause. This is done away with in all our insular possessions.—Under Charles I our ancestors established that treason should consist only of levying war against the state or adhering to its enemies and giving them aid and comfort, and be evidenced by some overt act to which there are two witnesses. It was under this right that even Aaron Burr was acquitted by his political enemy, John Marshall. Yet it has recently been asserted that the mailing of political arguments to American citizens might be such an overt act; and freedom of the press is forbidden in the Philippines.—The English Bill of Rights forbids pardoning a crime before trial. Newspapers have said that it was recently promised by our Attorney-General to the officials of a certain railroad.—The English people fought five cen-

turies to make the judiciary independent of the Crown, until they finally established that all judges should hold office during good behavior, for fixed salaries not alterable by the King, and removable only on joint address of the legislature. But a democratic Senator has recently introduced a bill to make our judges removable by the President; and the members of the Interstate Commerce Commission, with more power than most judges, are removable at the will of the President.—I have mentioned but a few of these political rights, with the briefest statement of their reason; but I hope enough to show their importance. And every one of these we have shown a recent tendency to forget.

Now are there any other natural rights, besides these cardinal rights we are discussing, which every individual must have? Kentucky and Wyoming declare that absolute arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority, and the Constitutions of most States make the famous statement which, after having appeared in the Constitutions of Massachusetts, New Hampshire, Virginia and North Caro-

lina, was adopted in the Federal Constitution in the Ninth Amendment, as the people at the time insisted, or the Constitution as a whole would not have been adopted: "This enumeration of rights shall not be construed to impair or deny others retained by the people." Even if the word liberty were not large enough to cover almost any possible infringement, it would probably be held, should our people or the people of any State have to face a course of oppression by any form of government, that these words were broad enough to cover any right not expressly and in terms taken from the people and given in the Constitution itself to the Government it created. For our Government exists only in and by the Constitution; if the Constitution falls, our Government itself falls with it. So Hooker in his "Ecclesiastical Polity"—"What power the King hath, he hath it but by law."

## IV

## GROWTH OF THESE RIGHTS; THEIR INFRINGEMENT BY KINGS AND THEIR REËSTABLISHMENT BY THE PEOPLE

WE have now briefly sketched the more important of the constitutional rights which appertain to the people at large, as distinct from those that merely have to do with the frame of government. Before coming to their adoption in our American Constitution, it would be well to consider what attacks were made upon them by the King or by other branches of the government in the years preceding that final attack by George III, which caused the thirteen colonies to revolt. Each attack led to a reaffirmation—always in a stronger and clearer form—so that, in pursuing this inquiry, we shall find the exact shape in which our ancestors understood them in 1787, when they drew up the Federal Constitution, or in

1780, when they drew up the constitutions of Virginia and Massachusetts.

It will be important in the first instance to notice by which arm of government the attack was made and by what method of approach. From the Norman Conquest until the accession of Queen Victoria attacks upon the British Constitution were always made by the King or by the Executive, by John, Henry VIII, James I, Charles I, by Oliver Cromwell, in his later days,—never by the *Parliament*, who were the representatives of the people; except, perhaps, when the Long Parliament lost its head under the later years of Charles I, and in the earlier years of the Commonwealth, before Cromwell did away with representative government at the point of the sword. The judicial branch, not in fact being a coördinate branch in England but merely the creature of the other two, and being possessed of no power to set aside laws, naturally made no such attack. Their only action, on the contrary, was to stand up for the Constitution against the King; this they steadfastly and bravely did for many centuries.

The method of approach to undermine

the Constitution was mainly the King's interference with other than executive duties, that is to say, with the Parliament or with the courts—trying to make the laws, or trying to judge them. There being no precise doctrine of the separation of powers in the English Constitution, it was easy for him to do this; and it was the very experience of this for many centuries which gave our fathers the wisdom to base our own Constitution on this cardinal principle.

The first attack, which began almost with William the Conqueror, was, of course, the attempt I have discussed so often of the Norman kings to persuade the people that *they* made the law and not the people themselves. This was so continuous until down to the time of Henry VI that I need give no particular instance. "Even William theoretically continued to govern as a constitutional king, the lawful successor of Edward, and in that character obliged to respect the laws and customs of the kingdom." But practically he governed in defiance of everything but his own wishes. "The Government was centralized," says Taswell-Langmead, "Local self-government was for a

time depressed." Nevertheless, he was careful to observe the forms of a King of the English, and in the fourth year of his reign "renewed the laws of Edward the Confessor—with certain additions made by himself for the advantage of the people of England." He held three times a year, at the accustomed times and places, the ancient national assembly.

That the people were re-asserting themselves is, perhaps, best shown in that Henry I on his accession, only thirty-four years after the Conquest, found it necessary to issue a charter of liberties; and this was renewed by Stephen and by Henry II, though neither King observed it when firmly seated on the throne. Under John, it served in the hands of Stephen Langton as the text upon which the barons founded their claim for a restoration of the ancient liberties of the nation. Our authorities give two great constitutional results of Henry's reign, both showing the restoration of popular rights; first, the maintenance of the local supremacy of the State over the Church of Rome; second, the restoration of Saxon law liberties by the abolition of the Norman method of trial by

battle, and the restoration, in an improved form, of both the grand jury, as the only body competent lawfully to charge a man with crime, and the petit jury, by which alone the crime was to be tried. Star Chambers, Courts of Chancery, Attainders, Informations, were all devices contrived by the successive kings to get rid of the two juries. Guizot, the French historian, tells us "that juries alone kept alive the germ of free institutions at the time when the predominant influence of the king in the judicial order produced this centralization." The kings, however, at that time, rather devoted their energies to the invention of ways to raise money by excessive taxation without respecting the ancient constitutional principle that taxes could only be imposed by the common consent of the realm and for the benefit of the people as a whole. This, curiously enough, was the first, as it was the last, effort of the English kings to undermine the liberties of the people. Taxation without legislative consent was the great object of the Norman kings, just as taxation without representation was the purpose of the last English king who seri-

ously endeavored to do away with constitutional principles.

When we come to John, the legal chroniclers complain that he set at defiance *all* laws. The people were compelled to make a stand, not so much for constitutional government as for personal liberty. Tyranny always provokes democracy, and the assembly at St. Albans called together to oppose John's pretensions, is the first historical instance of the summons of representatives of the common people to a national council of England. One of the things they complained of was the King's Court, which, during the Norman reigns, had drawn to itself the whole central administration of justice; not only did it hear all cases on appeal, but, by virtue of special writs or as a special favor, the King would call up cases from the local courts to be heard in his own courts according to such new methods as his advisers might invent. This court followed the person of the King wherever he went. It resulted in a perfect centralization of justice, but probably little greater in civil causes than would be the case if all our corporations did business

under a Federal charter. Hannis Taylor says: "As soon as the principle was firmly established that the king was the fountain of justice and that all courts were the king's courts, there was nothing to prevent the king from invading any jurisdiction and withdrawing from it any cause whatsoever." And that same dispute we have now once more, as a consequence of the Railroad Rate Regulation Act, and the trust laws, between our States and the Federal power. The result of all this, in England, was two articles in Magna Charta: "Common pleas shall not follow the King's Court, but be held in some certain place"; and again no royal writ was in future to be issued so as to cause a free man to lose the right to trial in his local court. Another article is notable, for it says that "justices shall only be appointed of such as know the law and mean duly to observe it." And, finally, the liberties of the charter were extended to "all men in our kingdom" without distinction of rank or station.

Immediately after being compelled to grant the Great Charter, John applied for aid to the Pope, who declared it void; but

John soon died, and Henry III confirmed it. But he omitted from his re-issue of the Charter the great clauses forbidding taxation without the consent of the people as expressed in Parliament, and also the qualification that judges should be learned in the law; and this was the next notable attack on the people's liberties. The lost clauses were only restored in the Confirmation of Charters granted by Edward I in 1297. Magna Charta was confirmed thirty-seven times by seven successive kings, ending with Henry VI, not to mention the great confirmation forced upon Charles I in the Petition of Rights and again granted by William of Orange in the Bill of Rights.

The third attack of the Norman kings was upon the judiciary. Henry II insisted on sitting in court and dispensing justice; and this was done by all the kings down to Edward II. Edward IV, we are told, sat in the King's Bench for three consecutive days in order to see how his laws were executed, but it is not said that he interfered in the proceedings. Finally, when James I sat personally in court and wished to interfere, he was told by the judges that he

could not deliver an opinion. This ended the interference of the Executive until the final great battle between the King and the Chief Justice in 1615, of which later.

During this earlier time the people were mainly occupied in winning back their local courts, their right to lawmaking, and the institution of the grand and petit jury. Even when the king allowed his judges to go on circuit, they were employed as his agents for squeezing money out of the people, of which, under Henry III, the baronage complained. When, too, the jury was finally established, the king got back at the people by inventing a method of attaint, that is, punishing the jury for a false verdict. This was frequently employed by the Tudor and Stuart kings. One of the most interesting cases happened as late as Charles II. William Penn, the famous Quaker, was prosecuted for having preached to a large assembly in Grace Church Street. The jury acquitted him and were accordingly fined twenty-six pounds apiece, quite as much as a thousand dollars of our money, and the foreman was committed to prison for refusing to pay. He sued out his writ of

*habeas corpus*. The defense was that he had been punished for finding a verdict against the evidence and the direction of the court. Chief Justice Vaughan held the ground to be insufficient and discharged the prisoner—so this was the end of the attempt of the King to interfere with juries, after he had failed to limit the people to his own courts.

His next attempt I anticipated in an earlier lecture. The King's great officer, the Chancellor, unconstitutionally assumed jurisdiction in common-law cases. Men were arbitrarily imprisoned on injunction process without indictment, and their land seized into the King's hands. A series of statutes were passed restraining this illegal invasion upon the rights of property and personal liberty. The statutes proving insufficient, they filed repeated petitions to the King, who returned an unsatisfactory answer, and it was not until 1352 that they obtained the enactment of a statute which, expounding the words of Magna Charta, explicitly declares that "whereas it states that none should be imprisoned unless by the law of the land, it is now established that

from henceforth none shall be taken by petition or suggestion made to the King unless by indictment of good and lawful people of the neighborhood." But in 1389 they had again to petition Richard II that the Chancellor should make no ordinance against the common law, to which the King returned the unsatisfactory answer, "Let it be done as has been the custom, *provided the royal prerogative be saved.*" Under Richard II, a few years later, the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals. Yet under Henry VIII it is said one-third of England was deprived of the common law. The abuse of the Chancery, particularly on its criminal side, went on; the Court of Star Chamber continued until abolished by Parliament under Charles I. It was then identical with the Privy Council; so that the same body of men exercised executive and judicial functions. This court was held competent to pronounce any sentence short of death; and the fines were frequently of enormous amounts, and in many cases

proved ruinous to the sufferers. So, by one path after another, but mainly by attacks upon the judiciary, the Tudor and the Stuart kings attempted to make the royal will the only law, until the last of the Stuart kings overthrew his dynasty in that attempt.

Richard II worked mainly through a corrupt bench of judges and a packed House of Commons; his favorite method was to secure the opinion of the judges beforehand on a question of law in his favor, then seize the most obnoxious members of the opposition and send them to those judges for trial. This also resulted in the loss of his kingdom a few years later. He finally persuaded the Commons practically to abdicate their powers in favor of a board of eighteen commissioners. This scheme worked perfectly, and caused no Parliament to be called for many years. This committee of eighteen issued ordinances at the King's will, granted taxes, decreed treason against all who disobeyed them, and authorized the King to dispense with statutes at pleasure. The people stood this for thirteen years and then he was deposed by that Parliament he had failed to call together.

Under the five kings of York and Lancaster the nation was busy with civil or foreign wars. In times of war the Constitution is silent. In militant civilization it has no part. Consequently we find little growth at this time. In nearly a hundred years there are but two things to note. The people succeeded in re-establishing the invaluable right of members of Parliament not to be questioned or punished for their speech in any other place. Freedom of speech, at least in Parliament, was thus established. On the other hand, the first disfranchising statute ever passed in England, putting a property qualification on the right of suffrage so that nobody could vote who had not land to the value of forty shillings a year, was passed under Henry VI. Up to that time they had manhood suffrage in England. This change practically confined the government of the country to the larger land owners, for forty shillings a year then was quite forty pounds of our money, and the people have never quite got back all their early freedom in this particular, even at the present day.

The Tudor period is an age of great ma-

terial prosperity owing to the discovery of America and the passage to the East Indies. "Intent upon the acquisition of private gain," says Taswell-Langmead, "merchants were, for the most part, satisfied to leave questions of government to others," much as has been the case here in the last ten years. On the Continent, the introduction of standing armies enabled sovereigns to do away with national assemblies. The free constitutions of Castile and Aragon were successfully overthrown. The States General of France, after languishing for a time, ceased altogether in 1614, and were only resuscitated for their final meeting, one hundred and seventy-five years later, on the eve of the great Revolution. The main reason that Parliamentary institutions did not pass away also in England was her insular position, which, rendering her secure against a foreign invasion, made it unnecessary to employ regular troops. Macaulay tells us that even as late as Henry VIII there were only two hundred paid soldiers in England; and the great historian, Freeman, tells us that the personal character of Henry VIII had something to do

with this. Tyrant as he was, he was yet animated by a scrupulous regard for the letter of the law. While his fellow-tyrants abroad were everywhere overthrowing free institutions, Henry showed them the deepest outward respect. He sheltered himself always under the letter of the law; otherwise his conscience seemed to be uneasy. A subservient Parliament made it possible to do this and still obtain all that he wanted. When Henry had cut off Ann Boleyn's head on one day and married Jane Seymour the next morning, this Parliament carefully listened to a speech from Lord Chancellor Audley, who assured them that the King did not do it "in any carnal concupiscence" and Parliament immediately proceeded to pass an act declaring that it was all done "of the King's most excellent goodness." Dr. Freeman says we had got into a state of things which our fathers called "unlaw," when judges were ready to declare anything to be the law, juries ready to find any verdict, and bishops ready to declare anything true and orthodox at the will of the mere capricious despot on the throne. Therefore, there is little formal attack on the liberties of

the people under Henry VIII which appears in the statute book. All he found it necessary to do was to control Parliament, and this he did by interference with elections, thus infringing on at least one constitutional principle, namely, that all elections shall be free. Although the power of the Crown increased until it acquired dangerous proportions, the want of a standing army acted as a perpetual restraint which, says Macauley, "while it did not protect the individual, secured the nation against general oppression." Under Henry VII, however, the criminal jurisdiction of the Court of Star Chamber had been revived and the persecution of the Puritans roused up a spirit of opposition to the Crown so that the struggle for religious freedom led to a fight being waged for political freedom, while Henry VII's effort to tax the people had provoked armed opposition—"taxation being the one point which the masses of the people seem to have considered worth fighting about."

The main attack, therefore, under Henry VIII, is the subjugation of Parliament; not so much the confusing of the legislative with

the executive, for Henry was nearly always careful to act under the forms of law, but the interference with elections and the packing of Parliament in favor of the King and his policies. This came to a head under Cardinal Wolsey in 1523. Parliament was asked to impose the then huge tax of 800,000 pounds, and being reluctant, Cardinal Wolsey himself, with pomp and retinue, with all his followers, his maces, his pillars, his pole axes, his cross, his hat, and the great seal, too, marched down personally to Parliament and was admitted. The Commons received his harangue in silence, even when Wolsey demanded an answer; but at last the Speaker falling on his knees with much reverence, excused the silence of the House, "abashed," as he said, "at the sight of so noble a personage"; but he then proceeded to show the Cardinal that his coming thither was "neither expedient nor agreeable to the ancient liberties of the House, it being the usage of the Commons to debate only amongst themselves." As a result of this brave assertion, the King did not summon Parliament again for seven years.

The next attack was the invention of

bills of attainder, of which I spoke in the first lecture. A bill of attainder is an act of Parliament finding a man guilty, or depriving him of civil rights, without a trial of any sort. Thomas Cromwell, by the King's express command, inquired of the judges whether, if Parliament should condemn a man to die for treason without hearing him in his defence, the attainder could be disputed. The subservient court replied that while it would form a dangerous precedent, Parliament was supreme and no attainder could be subsequently questioned in a court of law. And by the irony of fate, Cromwell was himself the first to perish by such a bill. But the device of attainder, thus established, was used both by Henry VIII, and later by the Stuarts, as a convenient method of getting rid of political adversaries; and while it has never been forbidden in the British Constitution, it inspired our ancestors with so much horror that it is with us doubly forbidden in the Federal Constitution, first to the Federal Government and then to the States.

The next effort of Henry VIII to get rid of constitutional liberties, while respecting

the form of law, was to secure an act giving his own proclamations the force of law. This, of course, is utterly counter to the English Constitution, as it had been won back from Norman kings in the preceding four hundred years. Nevertheless, the power of declaring laws or ordinances by the King, or by the King in Council, remained until the time of George III; and was one of the things the Declaration of Independence complained of—as it did also of the corresponding power of the King to suspend laws at his own discretion. Both were complained of in our Declaration of Independence and are forbidden by our own Constitutions. The President can make no law and he can suspend no law; nor can he lawfully promise that the law shall not be enforced.

Under Edward VI the law of treason which had been stretched very far under Henry VII, was at first brought back to constitutional principles, but afterwards re-enacted in a worse form than ever; until Parliament interfered and enacted that no person should be indicted for any treason except on the testimony of two lawful witnesses who should be brought face to face

with him at his trial. This safeguard, although shamelessly evaded or disregarded under Elizabeth and James I, never disappeared from the English Constitution and became part of ours. Aaron Burr was saved by it. In the short reign of Edward VI also appears the first clearly authenticated instance of *torture*. Now, the English law does not admit of torture. But the final note of the Tudor attempt to overthrow popular liberty is best expressed by a German—Gneist. It existed in an attempt to govern by the King in Council rather than by Parliament and courts; and so to manipulate both the courts and the legislature as to make them subservient to the despotic power of the Council, in which the royal will was omnipotent. Much as if to-day both Houses of Congress and the courts were to become subservient either to the President or to his Cabinet, which he controlled. Moreover, this Council—like our Interstate Commerce Commission—was both legislative, administrative and judicial. And among other things it governed—for 150 years—the American colonies. Its power rested on an idea of "an extraordinary

dictatorial power residing in the King which in any state crisis could thrust aside self-imposed barriers, laws and judicial constitution and find a remedy by extraordinary measures, jurisdiction and ordinances."

Still, however, the Tudor tyranny was powerless in the presence of an armed people. Its weakness lay in the absence of a standing military force. But in 1549, as a consequence of the Peasants' revolt—who revolted because of the enclosure of common land—Somerset, the protector, met Jack Cade at the head of a hundred thousand agricultural laborers in Kent with the aid of German and Italian mercenaries, regular soldiers, now for the first time employed by English rulers in the coercion of English subjects.

We have now (1550) a standing army. The natural consequences follow; in courts-martial, military law; billeting of soldiers, overawing the courts; and these are the principal things complained of against Charles I in the Petition of Right. But there were other rights that began to be interfered with at this time. The press, for instance, was placed under a strict censorship. Govern-

ment interference with elections became a common practice. Freedom of speech was attacked in the House of Commons by Elizabeth herself—causing one Peter Wentworth, a Cornishman, to say "Sweet is the name of liberty; but let us take care lest, contenting ourselves with the sweetness of the name, we lose and forego the thing. Two things do great hurt here, one a rumor which runneth about the House: 'Take heed what you do. The Queen's Majesty liketh not such a matter. Whosoever preferreth it she will be offended with him.' The other is a message sometimes brought into the House, either of commanding or inhibiting.—I would to God, Mr. Speaker, that these two were buried in Hell. The King hath no peer in the kingdom; but he ought to be under the law because the law maketh him a king." To this Queen Elizabeth replied: "Privilege of speech is granted; but you must know what privilege ye have; not to speak every word what he listeth, or what cometh into his brain to utter; your privilege is Ay or No"—and Mr. Peter Wentworth was committed to the Tower.

The next attack was on the liberty of

trade. Elizabeth, unwilling to incur the unpopularity of a direct tax, sought to raise money by the granting of monopolies, lavish grants to her courtiers of patents to deal exclusively in coal, leather, salt, oil, vinegar, starch, iron, lead, yarn, glass, and other common necessaries of life. This grievance was attacked in Parliament by a Mr. Bell who was at once summoned before the Queen's Council and returned to the House "with such an amazed countenance that it daunted all the rest." The abuse rose to a greater height. So numerous were the articles subject to monopoly that when a list of them was read over in 1601, an indignant member exclaimed "Is not bread amongst them? Nay, if no remedy is found for this, bread will be there before the next Parliament."

The populace openly cursed the monopolies, and seeing that resistance was no longer politic or even possible, Elizabeth, with a tact quite modern, sent a message to the Commons promising that some should be presently repealed, some superseded and none put in execution but such as should first have a trial according to the law, for

the good of the people—"good trusts and bad trusts." This, however, was not sufficient; and the great anti-monopoly statute was passed two years later. This act has passed into the British Constitution, and although the word "monopoly" does not appear in the Federal Constitution they are forbidden by the Constitutions of several of the States, and even this is hardly necessary, for they are contrary to the common law.

We come now to the House of Stuart. Their attack on English liberties may be summed up in two phrases. "Abnormal centralization," says our great historian, Hannis Taylor, "abnormal centralization was the fault of the House of Stuart." And the English Taswell-Langmead adds, "personal government, 'thorough.'" It began with the device of interfering with the elections. Neglecting the old principle that they should be free, James I took upon himself to specify the kind of men who were to be elected to the House of Commons, and directed that all returns should be sent to his Court of Chancery, which should reject such men as did not come up to his standard. So here the House had another fight, for

their own right to determine contested elections; and it came to a head in a document they drew up and presented to the King, modestly entitled "A form of Apology and Satisfaction to be delivered to his Majesty." This "form of apology" consisted in calling attention to the maintenance by the King of private law suits, to the monopolies of trade companies still existing, to the assertion that the Commons held their privileges of right and not of the King's grace; that they were the highest court in the realm; that the King had no business to meddle with the returns of their elections and other not too apologetic matters. This complaint the King met by allowing years to elapse without calling his Parliament together; and this familiar abuse of the Stuart kings led to our constitutional provision that Congress shall meet at least once every year. James repeated the offence of trying to make laws himself, and proclaiming certain acts to be crimes; and endeavored in vain to get a judgment from the great Coke that this was lawful. Coke said, "The king may make a proclamation of the law already existing, but of no new law; to put people in fear of

his displeasure, but not to inflict any fine or punishment." He attacked his enemies freely for political libel and in one case the royal officers searched a clergyman's house and found a manuscript sermon which had never been preached. It was forwarded to the King's Council, and the sentiments expressed not pleasing them, the clergyman was put to the rack and tortured and then indicted for treason on the ground that the manuscript contained matters which would be seditious if published. And here comes a noteworthy event. James directed his attorney-general, Bacon, to confer with the judges of the King's Bench separately and find out whether they would consider such a thing treason; in short he tried to ascertain and probably to influence, their opinions. Chief Justice Coke objected (so Bacon reported to the King), that "such private, auricular, taking of opinions was not according to the custom of the realm." The other judges weakened; but Coke persistently maintained that a mere declaration of the King's unworthiness to govern, in a written sermon which had never been preached, could not amount to treason.

Nevertheless the unfortunate minister was sentenced to death, but died in jail before he could be executed.

Now here begins a most pertinacious and continued attempt made by both James and Charles I to undermine the right of the subject to law, by intimidating or controlling the courts. It lasted over fifty years; and ended with the attempt to bulldoze the great Chief Justice Coke. The King asserted his right to interfere with the opinions of the judges in every case in which the rights of the Crown were in the slightest degree involved. This claim was met by pertinacious denial. Finally, the King ordered the twelve judges of the court not to proceed further in a certain cause until they should hear his pleasure. He complained that of late the courts of common law had grown so vast and transcendent as to meddle with the King's prerogative. Most of the judges fell upon their knees and asked his pardon, but Coke reiterated his opinion that the court should neither postpone or try a case upon the order of a king. King James then asked a formal legal opinion of the court whether, if his Majesty conceived a case to

concern him either in power or profit and thereupon required to consult with them and that they should stay proceedings in the meantime, they ought not to stay, accordingly. From Coke no other answer could be extracted than, that "whenever such a case should come before him he would do what was fitting for a judge to do." Then, a few weeks later he was censured by the King's Council and suspended from his office, and not long afterwards received notice that he had ceased to be Chief Justice. This was in 1616. In 1642 the Civil War began.

"The disgrace of Coke," says Gardiner, the historian, "is a great historical landmark." The common-law judges now held their offices at the "good pleasure of the sovereign." All this happened in 1616. It was not until after the English Revolution that the Act of Settlement declared that all judges should hold their office during good behavior and have neither their salaries nor their places dependent on the Executive. This ends the period of transition. The King, having acquired the legislative power, both by packing his Parliament and by cre-

ating a legislative body outside of Parliament, had now grabbed the judicial power also, by causing the judges to feel that they held their office only during his good pleasure and disgracing those who stood against it. We are now fairly embarked on the career of personal government which became the rallying cry of Charles I—he called it "Prerogative." Both James and Charles, and much more indeed after them George III, endeavored to carry out personal government by doing without the Cabinet and having a private cabinet of court favorites. Hannis Taylor tells us that in order to make the system of governing without a Parliament more responsive than ever to the King's personal will, James revived the detested influence represented by court favorites; and you will doubtless remember that this was so notable under George III that our rebellion was practically brought on by the government of the Earl of Bute, a Scotch favorite of King George, who was not only not in the Cabinet but had been turned out of the same; yet his influence prevailed against the legitimate cabinet of Lord North, who at one time might have placated the angry

colonies. "England," says Burke, "was governed by an interior cabinet—a secret coterie of the King's friends."

Finally, in 1624, James endeavored to get on without a Parliament entirely. Charles I, succeeding, after one or two abortive trials of Parliament, did the same thing. His first Parliament, by the great John Eliot, attacked the administration of a private favorite, the Duke of Buckingham. Whereupon Charles said to the House, "I must let you know that I will not allow any of my servants to be questioned among you, much less such as are of eminent place and near to me"; and a few days later the King summoned the Commons to his presence and told them to "remember that parliaments are altogether in my power for their calling, sitting, and dissolution; therefore, as I find the fruits of them good or evil, they are to be continued or not to be." His last Parliament signalized its existence by the ominous great Petition of Right. The Lords vainly proposed an amendment saving the sovereign power to his Majesty, but when the petition came back, Sir Edward Coke,—who had bobbed up serenely in the House of

Commons—refused. "I know how to add 'sovereign' to the King's person, but not to his power," said he, "and we cannot 'leave' to him a 'sovereign' power for we were never possessed of it. In my opinion it weakens Magna Charta and all the statutes, for they are absolute without any saving of sovereign power. Take we heed what we yield unto. Magna Charta is such a fellow that he will have no 'sovereign.'" Charles I refused to sign the Petition of Right at first, returning a long and equivocal answer. Whereupon the Commons proceeded to impeach his favorite, Buckingham, and then he hastily signed the bill as requested.

The principal new liberty prayed for in the Petition of Right was to be relieved from martial law and from the tyranny of commissions appointed by the King. But no Parliament was called again until the Long Parliament in 1640. Thus, England did without a free government for eleven years. France did without a States-General for one hundred and seventy-four years; but in both countries when the people's representatives were re-assembled their first act was to overthrow royalty and execute their king.

During these eleven years monopolies were re-established and applied to every article of ordinary consumption. Royal proclamations made the law; and the courts of Star Chamber and High Commission, outside the common law, by cruel and barbarous punishment, without a jury trial, maintained a reign of terror. The Bishop of Lincoln was fined. A poor clergyman who had written him a letter had his ears nailed to the door in front of his school. The father of the Archbishop of Glasgow had one ear cut off and his cheek branded. There were no juries in England and no common law. Everything was done by royal boards and high commissions—but finally arbitrary government split upon the old rock. The King endeavored to impose customs duties without an Act of Parliament upon the merchants of England; they resisted; and when they were brought before the King's Council, one of them—Richard Chambers—ventured to declare that "merchants are in no part of the world so screwed as in England. In Turkey they have more encouragement"; whereupon he was committed to the Marshalsea for contempt.

Next, the King turned his attention to the land owners. He imposed a huge tax to build a supposed navy, which never existed but on paper. But in the effort to collect this tax, he ran up against a modest country gentleman, one John Hampden of Buckinghamshire, who refused to pay twenty shillings, being the sum assessed upon his estate. The result you know. Charles committed Eliot and eight of his associate members to the Tower, and on the day set for its reassembling, dissolved the Parliament in which John Eliot had made his last and Oliver Cromwell his first speech. John Eliot died in gaol; and when his son asked permission to take his father's remains for burial to the country home in Devon where he was loved and honored by all, the King wrote:—"Let Sir John Eliot be buried in the church of that parish where he died." Then followed eleven years of personal rule, thorough and strenuous. The king's leader was Strafford—of whom Green, the historian, said, "Strafford is the one English statesman of all time who may be said to have had no sense of law." And Strafford was finally indicted for this, that is to say, for conspiring

to subvert the law of England; Charles could not save him and he perished on the scaffold. Charles himself was beheaded in 1649.

We have no time to dwell upon the Commonwealth except to say that its later history shows as well the danger of unconstitutional government by a legislature as by a king. Charles did little worse than the Rump Parliament, while the Protector showed a disregard of the right to law quite as cynical as that of a Stuart and much more frank. Disgusted with his Parliament he marched in with a file of soldiers, cleared the mace from the table and closed and locked the doors. Bradshaw, president of the Council, said to Cromwell, "Sir, you are mistaken to think that the Parliament is dissolved. No power under heaven can dissolve them but themselves. Therefore, take you notice of that." And after eight years of government by the Army, the survivors of this same House of Commons, without a new election, reassembled to welcome Charles II.

It is a curious fact that it was the conservative element in the House who endeavored to persuade Cromwell to take the title of king. Our American historian tells

us that the reason of this was that they believed that the prerogative as limited and defined by law, the limited powers of a king, were less dangerous to public liberty than the novel powers of a protector *unrestrained by any constitution.* Cromwell was deterred from accepting it by the angry protest of the army; but he succeeded in getting through the second new constitution in two years—the "Act of Government," under which the supreme power was still to remain with Cromwell; and—what he particularly wanted—he was authorized to name his own successor (Taylor, II, 352.) Mr. Roosevelt omits to note this in his "Life of Cromwell."

Both Charles II and James II interfered with the people's liberties mainly in their religious rights, and that need not detain us, but James increased the standing army to 30,000. James II, however, played the old trick of consulting the judges privately as to what their opinion would be on a proposed course of policy, and when it appeared that the chief justice, the chief baron of the exchequer and two other judges were of opinion that the King could not suspend

the law of England in the interest of the Catholics, these four judges were dismissed and their places supplied by others who were known to be subservient to the royal will. "I am determined," said the king, "to have twelve judges who will be all of my mind as to this matter." "Your Majesty," answered the chief justice, Jones, "Your Majesty may find twelve judges of your mind, but hardly twelve lawyers."

The people, however, did win from Charles II the great Habeas Corpus Act which is the final perfection of that machinery for the personal liberty of the Englishman that I spoke of in my second lecture. But James kept on interfering, and again the people rose, expelled their king, and the rising wave of the Revolution left in its flood the highest constitutional document since Magna Charta—the great Bill of Rights I have so often referred to. It repeats all the old liberty rights we have been discussing in these four lectures and adds to them a prohibition of standing armies without the consent of the people, asserts the right of people to bear arms, protects them from excessive bail or excessive fines

or cruel punishments, and guarantees every man the right to assemble for political purposes and to petition the government. And, most of all, it adds the great principle "That the pretended power of suspending laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." Finally, twelve years later, came the Act of Settlement—interesting to Englishmen because it provides for the descent of the Crown to Protestants only, but mainly notable to us because it puts back the provision omitted in the Bill of Rights that all judges should hold their office for life or during good behavior, for a fixed salary, and could only be removed by Parliament and never by the king; and adds another significant principle that the king may not pardon a man whom the Commons wish to impeach. And this, the last of the English constitutional documents, closes with the sentiment with which our first lecture began—the laws of England, for securing the rights and liberties of the people, are the birthright of the people; and all queens and kings ought to administer the government according to said laws. And they

mean here by the "laws" what we now call the English Constitution.

Nearly a quiet century of government by Parliament went by, and at last we come to George III. And he lost America by failing to understand two of the earliest and cardinal principles of the English Constitution. "'George, be King,' was the lesson his mother repeated to him as a child," says Horace Walpole. He was the most popular sovereign England had had in two hundred years, and he determined at the outset to reassert the personal power of the Crown. Taswell-Langmead tells us that the very characteristics which in a private station would have been accounted merits, rendered him unfit to be a constitutional king. "By his meddlesome energy and restless activity in regulating every affair of state from the greatest to the least, combined with a resolute obstinacy in enforcing his own views against the opinion of his constitutional advisers, he succeeded in reducing the nation from prosperity to the depths of adversity and in depriving the country forever of its American colonies." In 1780 even the House of Commons carried the

celebrated resolution introduced by Mr. Dunning "That the influence of the Crown has increased, is increasing and ought to be diminished," but it was not until America was lost that George III came back to constitutional government. In a sense, therefore, we Americans—and so every constitutional historian is agreed—we Americans saved for the last time the liberties of the English people. In asserting our own, they resisted us and we were lost to them; but in the process we gained them theirs. To attempt to govern any English people without a legislature by the King in Council, by the Executive alone; to attempt to tax even loyal Canada by Act of Parliament at Westminister and not of Parliament at Ottawa; to subject Australia or New Zealand to the government even of an imperial House of Commons in which they were not represented;—would now call forth the jeers even of a Tory majority. This is the last of the constitutional principles we have given back to England. *We* left the British Empire because there was too much personal government. England learned the lesson well and no king will repeat the mistake again.

# V

## THE EXPRESSION OF THESE LIBERTIES IN OUR FEDERAL CONSTITUTION

ALL of these liberties we have been discussing, the liberties of the people, were re-established in our Federal Constitution in their early and most vigorous form, or in such improved form as the experience of our English ancestors under the Stuarts and Tudors, and the experience of our own ancestors under George III, suggested. Except the two or three cardinal constitutional inventions that we made, it may be doubted whether there is anything in our Constitution that is more than an expression or an amplification of an English Constitutional principle. But it will be extremely interesting to consider both the form of words that we chose and the number of principles we decided to express constitutionally; and more interesting still to note their division among the Executive, the

Legislative and the Judicial powers; and the other great three-fold division between the powers of the Federal Government, the powers or rights of the States, and the rights reserved or retained by the people,—which forms indeed the special subject of this course of lectures. We shall also have occasion to speak particularly of such rights or powers as seem to be of overweening importance in the future. Indeed, for the rest we shall look to the future rather than to the past.

It is most interesting to make a careful analysis of our Constitution, and note what importance it apparently assigns to these several divisions of power. We will continue our custom of taking up the rights of the people first, that domain of sovereign power which President Roosevelt seems to think was all surrendered by the people to the Federal Government when they formed the Union. The Constitution of the United States in its body and in the Amendments expresses or recognizes, in thirty-nine clauses, no less than sixty-six of these rights reserved to the people, which the Federal Government cannot take away.

On the other hand, when we come to the powers that are surrendered, given up by the people or by the States, to the Central Government, we can count, on a careful analysis, in fifty-seven clauses but sixty-four. Then we can count eleven more things which, being forbidden in the Constitution to both the Federal Government and the State Governments, are inferentially left with the people,—making seventy-seven rights or powers in all expressly mentioned or necessarily implied by this short document, which are forever to be left in the people's hands.

Now, as to the division of these sixty-four Federal rights or powers between the three branches of Government, Legislative, Executive, and Judicial; and I put these in the order, as the Constitution does, of their relative importance and dignity. I shall have failed indeed, if I have not persuaded you that the Anglo-Saxon theory always was that the people through their representatives, that is, the Legislature, were the sovereign power, the sovereign law-making body, and as such, superior to the Executive, the King. Our Constitution recognizes that

by adopting this order, mentioning the departments as so arranged. Taking, therefore, the legislative power first, we can count nineteen powers expressly given to Congress and we can count about seventy expressly denied.

Our Executive, as you know, corresponds to the English King, though elected but for a term of four years, and, as our Supreme Court has said, "With the loss of many a flower of the English King's prerogative." On the other hand, he has, in many respects, more powers than an English King under the Constitution, as we shall find when we consider them in detail. Great as they are, however, I can only find seven powers actually given to the President by the Constitution of the United States. All others are therefore denied. And in this connection it is a most striking thing to note that for the President the Constitution expressly provides a duty and an oath. The duty is to execute the laws; (Art. 3, Section 3) "He shall take care that the laws be faithfully executed." The oath is (Art. 3, Section 1, clause 7) "To preserve, protect, and defend the Constitution of the United States."

The judicial powers are almost negligible, for, in a sense, the courts have none. The Constitution only recognizes the Supreme Court. It gives to Congress the power to make other courts. Their duty, in a general way, is to try all suits between two States, or where the United States itself is a party; to try generally all cases arising on the sea or from the navigation of ships, —what we call Admiralty—and finally, what has grown most important of all, to try any suit that may happen to be between citizens of different States or between a corporation of one State and a citizen of another. They are given no other powers, and their main constitutional restriction is that they shall try no case coming up from a State court except according to the common law.

When we come to our other division, our second American invention which makes it possible for a strong national government to coexist with the local self-government of a free people, the division between the National powers and "States' Rights"—the rights never given by the people to the Federal Government—we shall find again that it is the people that are primarily thought of in

the Constitution. The number of rights reserved to them from the Federal Government is, as we have said, sixty-six, to which we must add the rights which result from things that are prohibited both to the Federal Government and to the States, making seventy-seven in all. The rights given to the States by the Federal Constitution, that is, the rights therein mentioned as expressly reserved to them, are only nineteen. Of these, twelve are forbidden to the Federal Government, four are shared or may be exercised by both, and three are left indefinite; but this small number, nineteen, of course, does not represent all the rights reserved to the States. Under the Tenth Amendment, *all* rights not expressly given to the Federal Government are reserved to the States or to the people. These nineteen clauses merely represent those rights which, for some reason, were thought sufficiently important to mention expressly in the Constitution.

Finally, the number of rights expressly given to the Federal Government amounts, as I said, to sixty-four. Of these, forty-three are forbidden to the States and seventeen

may apparently be shared or exercised by the States. At least, there is nothing in the Constitution to forbid it. Only four rights are expressly shared, divided, between the Federal Government and a State: the right of making a new State out of two States previously existing, or dividing an old State into two or more new States; this can only be done by the joint action of the National Congress and the legislatures of the States concerned; the right of levying imposts or duties with the consent of Congress; the duty of maintaining a republican form of Government; and the power of amending the Constitution. In only one case can the Federal Government coerce a State; that is, when it ceases to maintain a republican form of Government; though the Fourteenth Amendment added another case by implication, (apparently we were too proud to put it in words,) that is, that the United States may coerce a State if it secedes. The war settled that. On the other hand Article 5 of the original Constitution seems expressly to provide that a State may secede if it be deprived of its equal suffrage in the Senate. It is under this clause that we are

helpless to alter a state of things where Nevada, having about the population of the town of Brookline, sends two senators to the United States Senate.

Recapitulating, though I suppose this will be interesting only to persons who delight in figures, there are thirty-nine clauses expressing powers left with the people in the Constitution of the United States, though at least fifty or sixty more are so left by necessary implication. Sixty-six clauses contain things forbidden to the States, and eighteen contain things expressly allowed them. Sixty-one clauses state things forbidden the Federal Government, and sixty the things expressly allowed it. Three things are expressly given to both the Federal Government and the States, and twelve clauses contain things expressly forbidden to both, while thirty-nine clauses express powers withheld by the States or the people. As a grand result, our Federal Constitution contains one hundred and fifteen denials and only seventy-nine affirmations of power; while there are thirty-nine express reservations of sovereign domain left to the people. The excess of negations

over affirmations must not surprise us, for all constitutions consist mainly in imposing negatives. You will remember that the British Constitution, which we have already studied, consists mainly in showing what *the King* or his officers may not do; and the American Constitution is more complex, because it imposes negations on the Congress and the States as well as on the President.

Taking the people's rights first, the cardinal principle of all—that the people are sovereign and that they have only clothed the National Government with part of their powers—is expressed in two places. The first words of the Preamble are "We, the people of the United States, do establish this Constitution." It is not done by the States, as the Secession States'-rights people used to claim, it is done by the people as a whole. State lines for a moment disappear and are merged in the mightier fabric created by the people of the Nation.

On the other hand, turn to the Ninth and Tenth Amendments. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." "The powers

not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This is the great assertion that seems to give the present administration so much trouble,—the express statement that until the people choose to amend the Constitution, they do not wish the United States to exercise any powers they have not expressly delegated to it. Remember, most of the States refused to come into the Union until they got the promise that this Tenth Amendment should be adopted, which was done November 3, 1791, only two years after the original Constitution went into force. There would have been no Union but for this Amendment. There would have been no Nation but for the sacred promise to the people and the States that these powers should be reserved. Notice the words, "The powers not delegated to the United States by the Constitution." No powers are or can be delegated by the United States to the States, or still more, to the people. It is the other way about. It is the people or the States who delegate powers to the United States. Now,

President Roosevelt in his great speech at Harrisburg, October 3, 1906, used these words when speaking of his desire to regulate and control large fortunes: "Only the Nation can do this work. To relegate it to the States is a farce and is simply another way of saying that it shall not be done at all." Now I have nothing to do at present with the argument that there should be a prohibitive tax on the acquiring of large fortunes, nor even with the question whether that is a function that under our system should belong to the States or to the Nation to regulate, but I would call your attention particularly to the President's words. He said it would be useless to relegate this power to the States. I watched very carefully to see whether, in the repetitions of this speech, that word "relegate" would be changed, but it was not withdrawn. On the contrary it was used, if I mistake not, once or twice again. But to use that one phrase, to "relegate" a political power to the States, misstates the principle of the American Constitution. Under the Constitution, the Nation can relegate nothing to the States. It is the States or the people that delegate

powers to the Nation. Congress and the President have no power to delegate or relegate anything to the States. They could not if they tried. If a power is not granted to the Federal Government, it has nothing to do with it. If the power is granted, it is unconstitutional for it to break faith with the Nation's compact with the people and hand it back to the States again. That last matter was carefully considered in the Industrial Commission when one of the plans advanced for the regulation of Trusts was to relegate to the States the power over interstate commerce which the people had delegated to the Nation. It was felt that there might be a grave constitutional objection. A trust which is given to you may not by you be handed over to another. But whether that be so or not, of a power actually given to the United States, there is no question, it is axiomatic, that a power *never* given to the United States, never parted with by the people, cannot be either relegated or delegated back from the Nation to the States. It is the States, the people, that make the Nation—not the Nation the States. It is elementary that the Federal Govern-

ment has no power to delegate anything. It would be the creature endowing the creator. It is the States—the people—that have created the Federal Government, and the Federal Government is there only to obey their behest. A sovereign may make a grant to his people, but a government of limited powers may not endow, with any rights, the people of whom it is but the servant.

This is the great law of the Constitution. The Constitution is the tablet where the people have written their will and they have written their will that it shall never be changed save in the manner they have appointed. That is, by an amendment ratified by the people's representatives in three-fourths of the States. In another speech written after the President's attention had been called to this amendment, he says that he is for the people and for the Constitution when it reserves the people's rights, but not when it perpetuates the people's wrongs. Of that who is to be the judge,—one man, for the time being, the President of the United States, or the people of the United States?

The fundamental error lying in these conceptions of our government is to suppose that all powers exercised in other countries, kingdoms, or empires,—sovereign States, as they are called,—have been necessarily under our Constitution, reposed in some branch of the Government, State or Federal. In this same speech, the President points out that there may be gaps of power, gaps of prerogative, left between the Nation and the State, areas of domain, which, under our system, are exercised by nobody. If that be true, it is because the people willed it so. We have not clothed our fabric of government, as I said at the beginning, with all the sovereign powers of European empires. As our Supreme Court has said of the President, and it might equally well say it of Congress, "He is not a king, even for four years." The Federal Government has indeed succeeded to many of the rights of the British Crown and Parliament, but, as the great John Marshall said: "With many a flower of their prerogative stripped away." But these gaps of which President Roosevelt complains, are usually left by the non-action of the

State, that is, of the people of a State. Does that give the Federal Government a right to interfere? Does it not rather prove that the people of that State desire no action on that point? This is their undoubted prerogative, the undoubted prerogative of the State. Conditions vary, views change, aims differ. Because a State does not pass all the laws that it might pass, or all the laws that the President of the United States thinks it should, does that fact alone give the Federal Government a right to intervene? We have never passed any laws against trusts in Massachusetts. Does that fact, under the Constitution, authorize Congress to legislate upon the subject for us? Labor laws,—the hours of labor,—marriage laws,—the age of marriage,—differ under the statutes of all our States. The difference of climate alone is reason enough for this, to say nothing of social conditions. The President seems to think, however, that if he, or Congress, makes up his mind that a nine-hour law in factories is right, that very fact should authorize the Federal Government to impose it on all the States. One of the greatest safeties of our system of

Government is that every State has the right to try an experiment, to work out its salvation in its own way, and the other States profit by its example. English people have, for a thousand years, dearly kept their liberty, their persons, their property, their domestic affairs, aye, and their political affairs, at home in their own hands, each community making its own rules, its own customs; and they forced the Norman Kings to respect them all. I do not believe we shall part with this dearly-won heritage on any momentary impulse to extirpate a present wrong.

The second great right of the people expressly reserved in the Federal Constitution I should put as the one I mentioned in my first lecture. That wonderful principle of the separation of the powers and allowing no man or set of men to exercise two of them, to both make the laws and execute them or judge those who break them. This I hold to be the second great bulwark of freedom for the American people, and I will venture to state that no one ever questioned this until very recently, if at all. We shall reserve more consideration

of this subject for a future lecture. Tonight, merely by way of example, I would call your attention to the fact that the Interstate Commerce Commission, to a certain extent, and the Federal Bureau of Corporations (as the President would have it amended) both make laws and judge offenders. This, you know, was made an objection to the constitutionality of the Railway Rate Regulation Bill, and it has not yet been decided by the Supreme Court. Government by boards, by commissions, rather than by Congress and the other officers provided for that purpose in the Constitution, is getting to be a danger that is not only in the Nation but in the States. I would remind you of the abuses we found in the last lecture which attended the system in England, especially under Charles and George III. Let us not forget it. A board or commission is not a common-law creation. It stands between the people and the common law. It is apt to be an obstacle to the assertion of their rights, a hindrance rather than a help, and in the long run every board, yes, even the railroad commissions, the gas commissions of the several States, every

board, tends to become the creature of the thing that it was created to control. This separation of powers of which I speak is, of course, contained at the beginning of each of the three articles in the Federal Constitution. Art. I, Sec. 1, where it says "*All* legislative powers herein granted shall be vested in a Congress." Art. II, Sec. 1, "The Executive power shall be vested in a President." Art. III, Sec. 1, where it says, "The judicial power shall be vested in one Supreme Court." This is as compendious, though not perhaps so striking, a way of putting this great principle, as we find in the Constitution of Massachusetts, though it does not contain those splendid words of explanation, "To the end that it be a Government of laws and not of men."

The third great right of the people reserved in the people, never delegated by them to anybody to interfere with, is that of liberty; and we have fully discussed the history and the meaning of this great word to English ears. It is found again in the Preamble, 4th line, where it says: "We, the people, establish this Constitution in order to secure the blessings of liberty." It is found again

in the Fifth Amendment, where it says "No person shall be deprived of liberty without due process of law." It is found again in the Fourteenth Amendment, Section 1, where all States are forbidden from making or enforcing any law to abridge the privileges or immunities of citizens of the United States, "nor shall any State deprive any person of life, liberty or property without due process of law." Of this right, I really feel that I need now say no more. But the great guard of this right is expressly guaranteed, Art. I, Sec. 9, Cl. 2: "The privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." It does not say who is to suspend it then, but by our inherited precedent it could only be by act of Congress. Lincoln, however, was compelled by the necessity of public danger to suspend the writ without such consent.

Related to this personal right is the provision that no bill of attainder or *ex post facto* laws shall be passed. I have already explained what a bill of attainder is; and an *ex post facto* law is a law made to try a man

by after the offence is committed, making that a crime which was not crime when he did it, or inflicting greater or severer punishment. Closely related to this also is the provision that judgment in cases of impeachment shall only extend to removal from office and that there shall be no forfeiture or corruption of blood for treason, or other offences, Art. III, Sec. 3, Cl. 2. Clause 1 adopts the English Constitutional definition of treason; and finally, the liberties of the people are secured against too much personal Government, against usurpations of the Executive, by the requirement that Congress (Art. I, Sec. 4, Cl. 2) shall assemble at least once in every year.

The right of property is expressly secured in the Constitution by the clauses I have mentioned in the Fifth Amendment and the Fourteenth Amendment, that neither Nation nor State shall take away a man's property except by due process of law; and furthermore, still more effectively, against the Federal Government, by the great provision that there shall be no taxation without the consent of Congress, and that there shall be no direct taxes at all imposed upon the

people of the United States. For that is the effect of Art. I, Sec. 2, Cl. 3, and it was intended to be the effect when it was adopted. That is to say, there can be no direct tax unless it be imposed upon the several States absolutely according to their population. Under this, the people of Texas, of Arkansas,—of the poorer Southern States, would have to pay the same tax that was paid by the people in New York City or Boston; and this makes the imposition of such a tax prohibitive, and it was meant to be so, for the people of the United States will not consent to a tax which is not according to the amount of property, but to the mere numbers of the people of each State.

The freedom of the people's representatives is secured by the provision that members of Congress shall be free from arrest and shall not be questioned in any other place for any speech or debate. By Art. I, Sec. 8, Cl. 1, all duties, imposts and excises shall be uniform throughout the United States. The danger of standing armies to the people is protected against, as I have told you, by Art. I, Sec. 8, Cl. 12; neither the President nor Congress can maintain the regular army

without a vote of the House of Representatives every two years; and (Clause 16), neither the President nor Congress can interfere with the State militia except when employed in the actual service of the United States. This is further expressly guaranteed in the Second Amendment, which also says, that the right of the people to keep and bear arms shall not be infringed, and the Third Amendment, which says that no soldier shall be quartered in their houses. The religious rights are found in Art. VI, Sec. 3, which provides that no religious tests shall ever be required as a qualification for office, and again in the First Amendment, where Congress is forbidden to make any law respecting the people's religion or its free exercise. The same amendment affirms the people's right to freedom of speech, freedom of the press, the right of political assembly (which I discussed in an earlier lecture) and the right to petition the Government for a redress of grievances. Then, closely connected with the liberty right is the right of the people to be secure in their houses,—"An Englishman's house is his castle." Under the Fourth Amendment nobody, not

even an officer or a magistrate, or a policeman, may enter a person's house or search his papers and effects without a formal warrant duly issued upon probable cause, supported by sworn testimony and stating the reason why, the crime charged, the places to be searched and what they expect to find. The Sixth Amendment guarantees to the people the great liberty right of trial by jury, of being confronted with witnesses against him, of having witnesses in his favor; and the Seventh Amendment guarantees trial by jury in civil cases and insists upon the common law in any court of the United States, while the Eighth Amendment prohibits excessive bail, which, you remember, was one of the methods of evading the habeas corpus employed by the Stuart Kings. These are all commonplaces, perhaps. The right of a man to a jury or a grand jury is the cornerstone of our whole social fabric. Not to be questioned except, indeed, in our insular possessions. But there is a clause of the Fifth Amendment which is to be very much debated from now on, that is, that other constitutional provision which guarantees that no person shall be compelled in any

criminal case to be a witness against himself; that is, compelled to furnish evidence which may convict him of a crime. This, you remember, was the great point in the Chicago Beef Trust cases. Under a carelessly drawn Act of Congress, all corporations engaged in interstate commerce were compelled to furnish testimony, when desired, by Mr. Garfield, head of the Bureau of Corporations. Mr. Garfield forced the great packers in Chicago to give him that testimony and then, apparently to his surprise and that of the President, found that the Fifth Amendment protected them from conviction for the offences their own testimony had disclosed.

You may remember the very severe criticism imposed by the President upon one judge for his decision sustaining the people's liberties in this particular. With every desire to convict offenders of the Chicago Beef Trust, he could not, as an honest judge, annul this cardinal guaranty of Anglo-Saxon liberty; but after his decision was rendered, it was referred to with disapproval by the President in a message to Congress. In fact, his remarks were almost identical

with the remarks that I told you were made by James I of the great Coke, when he also refused to carry out the wish of the Executive; though the story, widely disseminated, has happily proven false, that a certain other judge,—a higher judge,—was approached by the President or his agent and asked whether he would affirm this decision if it were appealed and came before his court, and made the same answer that the great Coke made to King James "Sir, when that case comes before me for judgment, I will consider it as becometh a just Judge."

The next great popular right is that of equality,—political equality, and, as the President has well said, "Equality of opportunity." How is that guaranteed in the Federal Constitution? Well, in the first place, the Preamble uses the phrase "General welfare," which seems to imply it. Art. I, Sec. 9, forbids titles of nobility. Art. IV, Sec. 2, says that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; but after the slaves were emancipated, these expressions were not considered suffi-

cient, and the Fourteenth Amendment was adopted. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws."

These are the six or seven great cardinal rights which are expressly in the Constitution reserved to the people under that name, but this by no means ends the category of the people's rights. If the President intends, as he says, to enforce the Constitution when it represents the people's rights, but not when it represents the people's wrongs, he will have to consider many another sentence in the Constitution even with this limited view. Although he has the right to call together Congress in special session, you will see that he cannot prevent their assembling whenever they choose, and they are bound to the people to assemble at least once every year. Neither the President nor the Senate has the power to originate taxation (Art. I, Sec. 7). Neither the President nor Congress can interfere with the State Militia except when employed in the actual

service of the United States. In Art. I, Sec. 9, Cl. 5, you will find a very important provision. No tax or duty shall be laid on articles exported from any State. The clear intention of the Constitution was to make trade between the States absolutely free, to give the power to nobody to control it or prohibit it in any way, though when we come to discussing interstate commerce we shall find a curious change has taken place in our view of this matter in the last few years. And the next clause says that no preference shall be given by any regulation of commerce to the ports of one State over those of another. Some people think that under the new law, the Interstate Commerce Commission is giving a preference to Baltimore and other southern ports over Boston.

Art. III, Sec. 1, removes judges from the power of the President after they have once been appointed, by requiring not only that they shall hold office for life, but that their compensation may not be diminished during their continuance in office, though it may be increased. And finally, life, liberty, and property are expressly guaranteed, not only by the Nation to the individual,

but to the individual as against the State Governments, by the Fourteenth Amendment.

The rights of the States and the powers of the Federal Government will form the subject of our next two lectures. It may be well to close this with some consideration of the powers given to the President, and the powers given to Congress, and compare the result with what we found in England. We have briefly sketched the rights of the people which neither the President nor Congress can give away. Now, what powers have the people delegated to them?

Congress in the first place is not omnipotent as it is in England, but its powers of legislation are definitely limited to seventeen subjects, and to such laws as are necessary and proper for carrying into execution both these seventeen powers and all other powers which are given by the Constitution to the United States Government. As I have told you, the Federal Government, the Government of the United States, is mainly political; so you will find that most of these powers are political. That is to say, the great power of Government is to collect or

raise moneys, by duties and excises, for the purpose of the defence of the Union and the general welfare of the United States. This duty is put first; the necessary National power to defend the Nation and raise money for that purpose. Now, this general welfare phrase is usually misunderstood. It is spoken of as if there were a power given Congress to pass any law that is for the general welfare of the United States. Nothing of this kind is in the Constitution. The only mention of "general welfare" is that all taxes must be for the general welfare of the United States; and this, as you know, is an old English Constitutional principle.

The next National power is the usual sovereign right to borrow money, to create a National debt, and also, of course, to coin money, regulate weights and measures, and provide against counterfeiting. Then, Congress has the necessary National power of declaring war; this is given to Congress, and to Congress alone, not to the Executive. This is also true in England; but the President has far more power in this particular than has the King of England, for the President can *provoke* a war. He can, for

instance, mass the army on the frontier, or order the navy on a minatory expedition. This even the King of England could not do. Our President is Commander-in-Chief; not so the King. With the power to declare war goes, of course, the power to support armies and navies; and this is also given to Congress exclusively, as it is in England to Parliament,—to make rules for the Government of the army and navy, to provide for calling forth the State Militia to execute the laws of the Union when necessary. This is the only case where, under the Federal Constitution, the National Congress can, as it were, give orders to a State; and when the Militia are so called out, Congress has power to govern them. Then Congress is given power to determine who shall be considered United States citizens. It is given the sovereign power of issuing patents to inventors, and copyrights to authors, these being the only monopolies recognized by our law. It has sole power to punish piracies and felonies on the High Seas, and, of course, to erect and govern forts, magazines, dockyards, and other needful buildings for the National defence. All these

powers you may fairly call political; and now we come to only three of the seventeen which may be considered domestic or social. And it is certainly a coincidence that these two or three matters, which form the exception to the general rule that the power of Congress is purely political, have caused more doubt and led to more litigation than all the rest of them put together. Congress is given power to regulate bankruptcies throughout the United States. Congress is given power to establish post-offices and post-roads, and it has recently been seriously advanced that this simple provision gives the National Government the absolute dominion over all railroads. And, finally, Congress is given power to regulate commerce with foreign nations and among the several States. These last are the four words in the Constitution now most discussed, and under them the President seems to think that the whole principle that the Government's powers are mainly political may be got rid of. These words were originally put in the Constitution, not with the notion of giving the Federal Government the right to interfere or to regulate

interstate commerce, but for the purpose of preventing the States from doing so. Nevertheless, they may technically give to Congress the power to regulate, or even to forbid; and under the word "commerce" it is now proposed to include not only the goods or commodities actually transported in interstate commerce, or the instrumentalities of transport, steamboats or trains of cars, which was all the word was originally applied to, but even manufactures made by any corporation doing business in more than one State, or where the goods manufactured or any part of them are ultimately sold across State lines. Nor is this all. Not only are all articles of commerce and all manufactures so to be controlled, but even the persons or corporations who own them and the laborers or employees who make them. This, we shall specially consider in our last lecture. I would only now call attention to the fact that this phrase, "commerce among the several States," one of the only three phrases in all the powers given to Congress which are not purely political, under the interpretation proposed by President Roosevelt

would alter our Constitution more radically than almost any amendment could do. It will cease to be purely political, but will thrust its hand between every man and his neighbor, between every man and his own property. I told you at the beginning that the English idea was that an Englishman's life and his liberty and his worldly goods lay under his own government or that of his neighbors, and under laws made by people in the same community, considering only its welfare, which laws were tried at home in the domestic courts. This change will, in the long run, absolutely subvert that principle. The States will lose control of most of their business affairs, will lose the power to tax their own enterprises, will see their Courts shorn of their jurisdiction. Hardly any business will be so small, so local, as to be left to the State Power to control. We shall all be under the Government of Washington, under the legislation of Congress, under the judgment of the Supreme Court at Washington, quite as completely and much more hopelessly than the English of the Twelfth Century were under the power of the royal Chief Justice,

the royal Chancellor and the lawmaking by royal decree of the Norman Kings.

Of the judicial branch there is little to say except that the common law must prevail everywhere and that the Federal Courts have now, as they should have, jurisdiction of all suits involving the Federal Constitution or laws, or between persons residing in different States, if either person wishes it.

Coming lastly to the Executive, the President,—who corresponds to the English King. As I have already anticipated, he has far more power in one particular than has the English King. That is to say, he can make war or be the cause of war. He has in another respect far more power. He can control the Legislation. Under the modern English Constitution, the King, as you know, has no veto. No King, not the popular Edward VII, would dare to say no to any law which has passed Parliament. That has not even been tried since the reign of Queen Anne. Never even by George III. Our Executive has the right to declare void any law passed by Congress unless it be afterwards passed over his veto by two-thirds of each house, a thing which has

happened very few times in the history of the country. Thirdly, our President may make treaties with the consent of the Senate. These three great powers, the absolute command of the Army and Navy in such a way that he may at any moment bring on a war, limited only by the right of Congress not to vote appropriations; the corresponding right to make treaties; and the right to veto legislation;—are all powers which the King of England does not have. He shares with the King of England the right to name Ambassadors to foreign countries. He has another power greater than the King of England, however, in that he may form his own cabinet. The King has his forced upon him by a majority of the House of Commons. Both King and President, when they assume office, make oath that they will support the Constitution. The King may still dismiss Parliament, though he practically never does so without a vote of the majority. Our President may not do so, though he may convene Congress at any time. Our President may be impeached. The English King may still be deposed by Parliament, and if they deem wise, put to

death. The general duty of both is to execute the laws, though our President has far more power in that particular than has an English King.

It will be seen, therefore, that our President has, on the whole, during his term of office, far greater powers than the English Constitutional King. That was the reason which led the founders to regard this part of our Constitution with so much apprehension. And that was the reason which led George Washington to decline election for a third term,—an example which has been followed by all our Presidents since his time.

# VI

## DIVISION OF POWERS BETWEEN LEGISLATIVE, EXECUTIVE, AND JUDICIAL; AND BETWEEN THE FEDERAL GOVERNMENT AND THE STATES

ANALYSIS of the Constitution shows that it is largely composed of negatives; that is, what the Federal Government may not do, or what the States may not do; powers that are kept by the people in their own hands until they choose to amend the Constitution. Contrary to the apparent impression, the things reserved to the people are as many in number and greater in importance than those delegated to the Federal Power; and they can never be lost to them but by amendment duly submitted to the people or to the States. The people are the only judge of what are "the people's rights and what are the people's wrongs"; it is not for the Executive to judge of the Constitution or what is "work-

ing for good government." Mr. Roosevelt, in his life of Cromwell, criticises the Protector for doing this. "Unfortunately," he says, "Cromwell made the mental reservation that he should be himself the ultimate judge of what good government was."

Of the powers of the several departments, the Legislative is first in importance, but the Executive, the President, has on the whole distinctly more power than the King, though for only a term of years. The feeling that the President was given too great power was very strong among the founders of the United States, and for that reason Washington set the example of declining a third term. I quote from Roosevelt's life of Cromwell again, "The plea that the safety of the people and of the cause of righteousness depended upon his unchecked control is a plea always made in such cases, and generally without any basis in fact. . . . It was infinitely more essential to the salvation of the nation that Lincoln should be continued in power than it was to the salvation of the Commonwealth in 1654 that Cromwell should be continued in power. Lincoln would have been far more excusable

than Cromwell if he had insisted upon keeping control, yet such a thought never entered Lincoln's head. . . . So he (Cromwell) lost the right to stand with men like Washington and Lincoln of modern times and with the very few who, in some measure, approached their standard in ancient times."

The Judicial branch has really no power at all, in the sense of political power; its sole great duty is to guard the Constitution of the United States, to hold the balance even between the Executive and the Congress, or between the States and the Nation.

What is the exact division of all these powers between the States and the Nation? and what exactly is that group of most important matters which still remains reserved to the people? For this purpose it is possible to draw a chart which shall exactly show the state of things at a glance (see Frontispiece.) Our whole sphere or circle will represent all possible powers of a free and sovereign Nation, political, executive, legislative. Zone "A" represents those powers which are allowed to the Federal Government, and zone "B," those powers which are allowed to the States; where the two

zones cross, so that a small area is covered by both, we shall have "AB"; that is to say, those powers which can be exercised both by the States and by the Federal Government. There are many such in fact,—notably the great realm of taxation—but there is only one or two instances expressly so stated in the Constitution. These blue zones—"A" and "B"—are all the powers permitted to our Governments by the people who set them up; and if our whole sphere represents all possible legislative power, it is perhaps a rough approximation to say that these two zones "A" and "B," what may be done by the Nation and what may be done by the States, represent the great bulk of legislative power as it has been hitherto understood in constitutional countries. It does not, on the other hand, permit any principle that is not republican in form, or possibly anything destructive of private property, liberty or the other natural rights. All these matters, with the various political powers that are withheld from the Federal Government or from the States respectively, will find a place in the opposite red zones, "X" and "Z." Let us call what is for-

bidden to the United States "X" and draw that zone directly opposite to the zone of things permitted to the United States. In the same manner, let us call these things which are forbidden to the States zone "Z," in the part of the circle opposite to zone "B." We shall again, in like manner as before, have a certain section or realm where the two zones "X" and "Z" cross, and this part of our circle will exactly represent all those powers or things which are forbidden *both* to the States and to the Nation. Those powers, by inference, still remain with the people; but there are certain other matters which are *expressly* reserved to the people, which fall in the centre of our circle "Y"—properly left white—that part of the sphere of power which has not been covered by any of our delegations of power as we have drawn them on the chart.

Not only does this diagram show the exact relation of all the powers at a glance, but it well indicates still finer shades of meaning. That is to say, the area marked "A" simply represents those matters or powers delegated in the Federal Constitution to the Federal Government, without any expres-

sion in the Constitution itself whether they are for that reason forbidden to the States. The Constitution is merely silent on that point. This matter has been left, therefore, to court decision and common sense. But we have the other end of zone "A," section "AZ," where the zone of powers forbidden to the States crosses that of the powers allowed to the United States, so whatever we put in this zone exactly represents those powers which, in the Constitution, are delegated by the people to the United States, and at the same time expressly forbidden to the States—this is the field of Centralization, of Imperialism. And the same thing is true of the powers permitted to the States or left with them. There are some that are simply permitted to the States, without more, "B," and these may perhaps be exercised also by the Federal Government. That has been matter again for court decision and common sense. But the other end of zone "B," where the zone of things forbidden the Federal Government crosses the zone of things allowed to the States, we have division "BX," that is, powers which are left with the States and expressly forbidden to

the Federal Government. We have, therefore, nine grand divisions, and the central one "Y," represents most of what we were talking of in our earlier lectures—the cardinal rights of the people.

Now just how, in fact, are all possible powers of government or of legislation to be divided under our Constitution? This is what the people call the study of States' rights, and I think it is likely—so important is it—to be the principal political issue of the next century. We must not be prejudiced against the term "States' rights," because we associate the use of the phrase with secession; the States never had a right to secede, for the States did not make the Federal Government; the people did. The constitutional falsity of the right to secede was established by the War of the Rebellion. Let us therefore approach the problem without prejudice, in a fair and honest way, remembering both what our founders desired, what their difficulties were, and what the lesson of the past history of the English people teaches us. Let us remember that to deny a right to State or Nation because the people wish to retain it to themselves is not

in the least a narrow or unpatriotic construction of our Constitution. I have failed, indeed, if I have not shown you that when our ancestors made this Nation, they did it with the express intent of not giving to the government they were creating all powers which have been enjoyed by other sovereign governments. It was a wonderful and tremendous experiment for that reason. They desired to establish a republican form of government; and they did not intend to give to their government any royal or imperial powers, or any right to play the part that had been played by conquering kings in earlier centuries. To say, therefore, that a power is denied to the Federal Government, may merely mean that they held the liberties of the people more sacred, and the power itself dangerous; and probably in all such cases the history of times past will justify it. For every one of the powers so refused the Federal Government is a power which, in the centuries behind us, has proved dangerous to the liberties of the English people when enjoyed by the King or a centralized government.

Let us take up first what is permitted to

the United States. We have necessarily in part anticipated some of these matters in our last chapter. What the people of the United States delegated by their Constitution to the Federal Government in 1789 is represented in our chart by zone "A"; and that part of those powers which they gave to the United States and at the same time prohibited to the States, "AZ," represents exactly the National powers of the American Government. That is to say, only those things which are *both* given to the Federal Government *and* forbidden to the States or to the people, are powers which the United States really enjoys in its National sovereign capacity. We will therefore take these first. In this segment of a zone, "AZ," must lie all the National powers which the Central Government can constitutionally exercise. Both Congress and President, to read their title clear to anything they wish to do or any law they wish to enact, have got to find its authority given by the people in those clauses of the Constitution which I shall now enter in this section. Substantially all powers of legislation that are given Congress are found in Section 8 of Article I, and they

number 17. They are all, except three or four, *political* powers; being the usual political powers that are enjoyed by independent and sovereign nations; although nothing is expressly said about the acquisition of territory. Congress is given power to declare war; and the annexation of territory must be justified, under those three words, as a necessary power resulting from the right to make treaties of peace, which, of course, is included in the right to declare war. A usual consequence of treaties having been acquisition of money or territory, our Supreme Court has upheld the action of Congress in acquiring territory in this manner.

Congress is given power to borrow money on the credit of the United States; and probably this must be done only for the debts or needs of the United States, not, as was recently done, in the interest of private business. Congress only may establish an uniform rule of naturalization, the making of foreigners into citizens. It alone may establish a national bankruptcy law. It alone may coin money, regulate weights and measures, and provide for counterfeiting. It alone may establish post-offices and post

roads, but probably only for the purposes of post roads, not, as was recently proposed, to use this as the entering wedge for the direct control of the entire railroad system of the United States. It may create monopolies for new inventions or copyrights only, and for a limited time. It may, at its own pleasure, erect courts inferior to the Supreme Court, not necessarily even with appeal to it, and these courts must always proceed according to the common law, with jury trial, and have the necessary judicial powers of all courts; it is doubtful, therefore, whether their right of punishment for contempt may be interfered with; Congress may choose not to establish a court, but when it has done so it must be a court in the historical English sense, and not the amorphous creation of Congress. It may define and punish piracies and felonies on the high seas. It may provide and maintain a Navy, though query whether a State may not do so also. It may make rules for the government of the Army and Navy, and for the militia, but only when in the service of the United States. It may exercise exclusive legislation over the District of Columbia and

places purchased with the consent of the State, in which the same shall be, for forts, magazines, arsenals, dockyards and other needful buildings. Without such consent or for any other purpose, the United States Government has no power to own, as a private owner, one rood of land. Finally, it alone may declare war.

And even all these powers are not given without limitation. For instance, no army can be supported by the Nation for more than two years without a new vote of the popular house of Congress.

Then we find here two or three other most important powers which are not political; greatest of all being the power to regulate commerce among the several States. Nearly all the increase of National power over the people's affairs that is now contemplated is based upon these four words. If the extremists have their way, the Interstate Commerce power will become the means of remodeling, utterly making over the Constitution, obliterating its general great division between political and social or domestic powers or laws, and taking away the ordinary business affairs of the people from

their home courts and from State laws and placing them with the political powers under the control of the Federal Government. This, therefore, is one of the two or three principles that are going to be most important for us, in the future, rightly to determine.

We next come to Clause 18, which has been almost as much discussed as the Interstate Commerce Clause. This is the *only* general grant of legislative power to Congress. All other matters are specific. But at the end of all these specific powers, Congress, by this clause, is given a general authority "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the United States or any department or office thereof." The extreme loose constructionists, the extreme centralists, go to the length of saying that under this section Congress can pass any act which *they* consider either necessary or proper for any of the purposes indicated throughout the Federal Constitution; for example, because Congress is given power to regulate commerce among the several States, they can, if they choose, forbid such

commerce entirely, or they could, on the other hand, provide that all such commerce must be conducted by Federal officers licensed for the purpose, or by corporations with a Federal charter. Or even that the goods transported should be manufactured under the Federal Government's notions of what is right and wrong. The Democrats, on the other hand, have always maintained that these words "necessary and proper" should be read as written. They mean *both* necessary *and* proper; and of that necessity not Congress which makes the law, but the Courts shall judge. The Supreme Court in its decisions has taken a middle ground. While not holding that a law must be both proper and necessary, they do hold that a law must be proper in their sight, and also reasonably adapted to the end proposed. That is to say, if the courts can see on the face of a law that although not the best possible method, it is still a method fairly applicable to the object proposed, they will sustain the law under this power.

But now in all these matters also comes another question, whether they should fall in our class "A," or, as we have placed

them, in our class "AZ"? I have put them all in "AZ," although often, as with interstate commerce, it has been held that a certain power of regulation is left with the States, at least until Congress chooses to interfere. When there is a National law on the subject, the State law must give way; and the same thing is, of course, true in the matter of bankruptcies. Our State insolvency laws are suspended while and when the Nation has a national bankruptcy act. There is no doubt, however, that a State cannot declare war, or regulate commerce with foreign nations, or borrow money on the credit of the United States, or establish rules for naturalization, or coin money. We conclude, therefore, that these seventeen legislative powers given to Congress are usually exclusive; that is to say, they leave no power with the States to legislate on those subjects; certainly not, when Congress has passed an act.

The next great subject of National power is, of course, the Executive power generally (II, 2). The Executive power of the United States is vested in the President. In substance he has the power and the duty of

executing the laws; he appoints all National officers; he is Commander-in-chief of the Army and Navy; and he generally has the powers of a constitutional British King except in so far as those powers are taken from him in other parts of the Constitution and entrusted to other bodies. He cannot declare war, but he may, with the consent of two-thirds of the Senate, make a treaty. And at this clause we find our first instance of usurpation of powers by Congress or by one branch of Congress. The President is given power to make treaties, and the intention of the Constitution clearly is that that power shall be full and merely be confirmed by the Senate in the ordinary way that other executive acts are confirmed. That is to say, they have no business to interfere with the President in his negotiations of a treaty, and they ought to confirm it, when negotiated, unless there is really some serious objection. Nevertheless, the Senate has taken it upon itself practically to arrogate unto itself the whole right of treaty-making power. You will remember that they disapproved a very important arbitration treaty with England made by Secretary Hay; they

have refused reciprocity treaties negotiated under McKinley and others; they have opposed treaties about Newfoundland and Canada; and they have assumed such an attitude in relation to San Domingo as to make it necessary for President Roosevelt to go ahead alone. It is not too much to say that it is almost impossible for a President, however intelligent and patriotic, to get a treaty confirmed against which a small body of Senators have any objection. This, therefore, is a clear case of usurpation of constitutional power by the Senate.

Substantially the only limitations on the President's executive power are that he may not prevent the Houses of Congress from assembling, nor may he adjourn them when assembled (but he has the power to call them in special session); that he must be a natural-born citizen; and that he must make oath to support the Constitution of the United States. Finally, he, with all other civil officers, may be removed from office by impeachment.

The judicial power of the Federal Government falls usually in our zone "AZ." But there are many restrictions, in "X."

You remember how important a part this was of the English Kings' prerogative,—how the Norman Kings almost destroyed the liberties of the people by removing the judicial power from their own common law courts and centralizing it with the Chancellor or the King's Court at London, where cases both civil and criminal could be, and in fact were, tried without a jury. Well, we have protected against this latter danger (Amendment VII) by providing that no case removed to a Federal Court shall ever be tried except under the common law, and we have further provided (Art. III, 2) that the trial of all crimes must be by jury and be held in the State where the crimes were committed, even if tried in a Federal court. We have, however, given the National Courts authority to determine all cases arising under the Constitution or a Federal law ("AZ"), and we have furthermore provided that the Federal Courts may try all cases "between citizens of different States" ("A" or "AB"). Now these five words, like the four words of the Interstate Commerce Clause, have caused and are causing a change in the relations of the Nation to the

State, probably unforeseen by our ancestors. In those days, suits between citizens of different States were comparatively rare. People's business rarely extended beyond State lines. To-day it nearly always does, even in the case of individuals. Moreover, nowadays, the great bulk of the business of the country is done by corporations; and though corporations still, nearly all, work under State charters, it by no means happens that the charters are given in the State where it does business. On the contrary, a business corporation doing business in Boston or New York is quite as likely to be a corporation of the State of Maine, or West Virginia, or New Jersey, as of the State where it really is situated. The consequence is that a vast mass of transactions, and the great majority of business law suits is growing to be between parties who are technically of different States, and this state of things has transferred the great bulk of business from the State to the Federal Courts. And if the President's proposal to have all large corporations take out a Federal charter were to pass into law, this would be almost universal, and any dispute or busi-

ness involving a corporation—and nearly all business would in fact be conducted by corporations in such a case—would be removed from the State Courts to be tried in the Federal Courts.

Still, the Federal Government has no power directly to interfere with the States except if they fail to maintain a republican form of government and except also (Art. IV, Sec. 1) that full faith and credit shall be given in each State to the public Acts, records, and judicial proceedings of every other, and that Congress may pass laws carrying this provision into effect ("A"). Finally, in Art. IV, Sec. 3, is the great phrase on which the expansion of the Nation is now proceeding. Congress has power to admit new States into the Union ("AZ"), though it may not alter the boundaries of old States without their consent ("X" or "AB"), and in the same section Congress is given power to make "all needful rules and regulations respecting the territory or other property belonging to the United States" ("AZ"). On these two commandments hang all the law and profits of imperialism. Nothing is said about the *territory from*

*which* new States may be admitted, and there is no doubt that the founders, at least in this section of the country, thought it was limited to the territory acquired from England in the Revolution. That notion was disposed of by Thomas Jefferson in his acquisition of Louisiana. Still it was perhaps thought until recently that the power to acquire new territory, certainly to make new States out of it, was limited to the continental territory of North America.

Government of all such territory before it is made into States is based on the second clause of the Article, that Congress may make needful rules concerning it. Whether those "needful rules" include the withholding of the Constitution, or the administering of the Constitution in such small doses as it may deem healthy for the patient, is a matter still in discussion, and not perhaps yet settled. One portion of the Constitution at least must "follow the flag"—the Thirteenth Amendment, for it says in so many words that it applies to any place subject to the jurisdiction of the United States.

So much for the Federal powers given to the Federal Government in the Constitu-

tion and forbidden to the States. The great Fourteenth Amendment, though, which was passed after the Civil War, added one tremendous principle. Passed in theory to protect the negroes in the South, it practically gave a new bill of rights to all the citizens of the United States and gave the Federal Government the power to prevent the States from passing laws in contradiction therewith. That is to say, while the States already by their own Constitutions adopted the cardinal principle of the Bill of Rights, that life, liberty, or property could not be taken away without due process of law, by the Fourteenth Amendment the United States Government was empowered also to guarantee this to all United States citizens, and even as against the States; so that the people in their important liberty and property rights have now not only the guaranty of their own State Constitutions, as State citizens, but of Section 1 of the Fourteenth Amendment, as United States citizens, which puts, as it were, the whole authority of the Federal Government also behind the cardinal proposition that no State shall deprive any person of life, liberty, or property with-

out due process of law, nor deny to any person the equal protection of the laws.

The things forbidden to the States simply ("Z"), are generally those National political powers which were reserved to the Nation in our division "A," matters concerning national taxation, revenue, defence, and the control of commerce among the States. The States are forbidden (I, 2) to make their elections for members of Congress less popular than for the lower house of the State Legislature. In the next clause they are forbidden to elect to Congress a man who has not been for seven years a citizen of the United States; but the great clause that goes into "Z" is Art. I, Sec. 10: No State shall enter into any treaty, alliance, or confederation, grant letters of marque, coin money, issue paper money, etc., with the same broad guaranties of human liberty, as to bills of attainder, *ex post facto* laws, etc., that we found forbidden also to the Federal Government. Then, in the next clause, they cannot lay duties on imports or exports nor impose tonnage duties, nor keep troops or ships of war, or engage in war unless actually attacked. They are forbid-

den (IV, 1) not to give full credit to the public acts and court decisions of other States; and (Sec. 2), not to extend to the citizens of other States all the privileges they extend to their own citizens. Finally, there are the great provisions of the Fourteenth Amendment we have discussed above.

Perhaps the next logical thing is to take what is *forbidden* to the United States. This zone we mark "X"—red, horizontal lines —and it has the modifications of "BX," permitted to the States and forbidden to the Federal Government, and "ZX," forbidden to both the States and the Federal Government. Taking the plain restrictions first, they have been somewhat anticipated. Perhaps the greatest principle is the insistence on a republican form of government (Art. IV, 4). Art. I, Sec. 2, the House of Representatives (corresponding to the House of Commons in England) is to be chosen every second year by the people of the States. In the same section, third paragraph, is the extraordinary withholding of the power of direct taxes from the Federal Government. This I have adverted to. Direct taxes being most distinctly a sovereign power, their pro-

hibition to the Federal Government shows how little of a sovereign the framers intended that to be. Section 4 provides that Congress must assemble at least once a year, thus even oftener than the House of Commons, which, in the time of Cromwell, was established for three years, though it actually now meets every year.

The usual constitutional privilege of freedom from arrest and freedom of debate is extended in Section 6, and the members of the Legislative body are forbidden from holding salaried offices in the United States. Section 7 copies the English constitutional provision that money bills must be started by the popular house; and here we find a second great usurpation of our Upper House. This clause of the Constitution intended to adopt the English principle, founded and fought for for many centuries, that taxation bills should be made by the people through their representatives and should only be introduced in the Lower House, as in England, they can only be introduced by the House of Commons. Here, of late years, under the fiction of amendments, the Senate has arrogated to itself the lion's share of the

power of taxation and appropriation. Every year there is a struggle on this point. The House originates all appropriations in what is called the General Appropriation Bill. In the same way they originate all tariff acts—the Wilson Tariff, for instance, under Cleveland—but when such bills go to the Senate they are amended and altered to such an extent that the Senate might as well strike out all but the enacting clause. The greater power and discipline of the Senate make this possible. The House is ruled by majority vote, at least when the Speaker permits it; but the Senate is practically ruled, that is, legislation may be blocked by the will of one Senator; moreover, the Senate has continuity, in that only one-third of its members can change at any Congress, while practically seats in the Senate are held for life, except in rare instances. So here we note another invasion of constitutional right, this time again by the Senate, on the will of the people as expressed in the Constitution.

Section 8 provides that taxes must be uniform. The Federal Government (Section 9) is forbidden to suspend the writ of habeas

corpus, to pass bills of attainder, to impose export taxes, and to prefer one port or the ports of one State over those of another. Money can only be paid out on appropriations and expended for the purpose indicated, and titles of nobility are forbidden. Article III incorporates the great provision of the English Constitution that judges must hold their office during good behavior for a fixed compensation. I told you how a Missouri Congressman had introduced a bill that all judges should be removable at the will of the President. This would, of course, require an amendment to the Constitution, and the people will be far too intelligent to consent to it. Mr. Bryan, however, has proposed that all Federal judges should be elected and not appointed by the President. The wisdom of this may be questioned. Nominations by the people for judges or minor offices have not, in our history, been nearly so intelligent as their nominations for the President. We have had very few Presidents whose nomination of high judges we might not trust rather than the chance of political caucuses. And if Mr. Bryan proposes to do away with the life tenure of Fed-

eral judges, he is striking at one of the most valuable points of both the British and the American Constitution, which, as you remember, was established only after many centuries of struggle against James I and Charles, in the Act of Settlement after the English Revolution. The question of election or appointment does not so much matter; but a permanent tenure seems essential.

To elect Federal judges, however, would require an amendment to the Constitution, and not only this, but it would be difficult to provide the machinery. Are judges of the Supreme Court, for instance, to be elected by the whole people of the United States and judges of the Circuit Courts by the people of the representative circuits? This would require a whole machinery of election which we have not now got. The argument against appointment by the President, too, is based on a misconception. Undoubtedly the President fairly represents the will of the people for the time being; and he has a perfect constitutional right to designate judges of his own way of thinking. I have sometimes in these lectures criticised

presidents for interfering with the judiciary or blaming their decisions, but one must frankly recognize the necessity of appointing judges in accord with the prevailing politics of the time. We have, for instance, embarked on a national policy in connection with the Philippine Islands; whether rightly or wrongly, the country is at present committed to it. It would be perfectly impossible for any President to appoint a judge of the Supreme Court who he thought was likely to take a strict constitutional view of the case and insist on extending habeas corpus, indictments, trial by jury, and other Anglo-Saxon safeguards to the people of the Philippine Islands. The fact is, the weapons of English liberty are meant to be worn only by Anglo-Saxon peoples, including, of course, the Scotch and Irish, and it is an example of fantastic logic, than which nothing can be more dangerous, to insist at once on extending them to the brown or yellow races under our dominion.

Section 2 forbids crimes to be tried otherwise than by jury. Section 3 defines treason as defined by the modern English Constitution. Art. V, no State shall ever be de-

prived of its two senators, even by amendment of the Constitution—this is the right of rebellion of which I spoke, both "X" and "XZ"—and Art. VI ("X" only) forbids religious tests for office.

The Amendments, being the National bill of rights, mainly fall under the head we are now discussing, plain "X"; that is, they do not control the States, which had their own guarantees. The first nine apply only to the Federal Government. Art. I guaranteeing free religion; Art. II, the right to bear arms; Art. III forbids the quartering of soldiers. Art. IV forbids search warrants without reasonable cause, and generally establishes the right of a citizen to the privacy of his own possessions. Art. V makes indictments necessary for a man to be tried for any crime; forbids his being tried twice for the same offence, and forbids criminating evidence—that is to say, compelling a man to be a witness against himself. I shall discuss these two matters later. This important article also incorporates in the National Constitution the great clause of Magna Charta, that no one shall be deprived of life, liberty, or property without due process

of law, and also that other section of Magna Charta which forbids the taking of a man's property for public purposes without just compensation; and Art. VI requires a petit jury for the actual trial of the crime, and requires that no person shall be detained without being told why—this last being the right to law which I spoke of in my first lecture. Art. VII requires jury trial in civil cases. Art. VIII forbids excessive bail and cruel punishments. The eleventh article of amendment forbids suits against a sovereign State. The thirteenth abolishes slavery. The fourteenth establishes the right of all United States citizens to equal treatment by the States, despite their race or color.

I have reserved the most important to the last. This is the tenth. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This is the great area of "Y," we have left white—virgin still, with the people. And this is the only part of the Constitution covering infinite, indefinite, political power—the rights, powers and liber-

ties reserved to the people and to their home governments.

It will be seen from this brief survey that I was justified in saying at the beginning that the Constitution, in so far as it affected the Federal Government, consisted mainly of restrictions; while comparatively few restrictions are imposed upon the States —the general theory being that they have all legislative powers of ordinary republics.

And let us also see what things are forbidden to both States and Nation—"XZ"—as this is most significant; moreover, such matters, though the Constitution does not expressly say so, must fall, with their expressly reserved liberties, in the people's domain, "Y." Mainly these consist in the cardinal liberty rights—life, liberty, property, free religion (Amendments 5, 13, 14), etc., also the prohibition of titles of nobility, of bills of attainder, and the insistence on a republican form of government by both the Nation and the State, elections of the House by the people (I, 2), the assurance of equal rights by law (Amendments 5 and 14), and the right to vote (Amendment 15).

We now come to our zone of "B"—States' Rights. Very few things have to be given expressly to the States, because the general theory is that they have all powers not expressly parted with. They are expressly given control over their militia. They are given power to demand extradition of criminals from other States; they are guaranteed their territorial integrity; they are protected against law-suits.

Then, in the division "BX," given to the States and forbidden to the Nation, we have the Constitution's own definition of States' Rights; the States are expressly, by the Tenth Amendment, given all powers not expressly delegated to the Federal Government in the Constitution. This is the great right reserved, and has been fully discussed already—that there is nothing in the whole body of political power which does not belong to States' Rights unless it is expressly delegated to the Federal Government in the Constitution itself. This provision is so broad that it is hardly necessary for the Constitution to say more. It does, however, expressly give a few things to the States and forbids them to the Nation. For

instance (I, 2), the right to elect members of the House of Representatives by the people of the States and to have a number of representatives proportionate to their population; the right of State Governments to issue writs for elections to fill vacancies; (Art. I, Sec. 3) the right to have two Senators from each State chosen by the Legislature thereof, each senator to have one vote; and in the next clause the right of the Governor to appoint senators to fill vacancies; (Art. I, Sec. 4) the right to manage, control and fix the times and places of their own elections, even for United States Senators; (I, 8, 16) the right to appoint the officers of their own militia; (II, 1, 2) the right to appoint electors for the United States President even, in such manner as the State Legislature direct, not to be controlled by the Federal Government. They can be appointed, either by election throughout the State as a whole, or by election in districts, or even directly by the State Legislature it would seem, though the last has never been done. But Michigan and other States have had elections by districts.

The chief matter which is common to

both the State and Nation ("AB") is that of taxation, jurisdiction of ordinary lawsuits, and the forming of new States. States and Nation (IV, 4) may combine to repress domestic violence. They have to combine to amend the Constitution (Art. V), and (IV, 3, 1) to alter State boundaries. Otherwise there is no overlapping, and, despite the President's opinion, no gaps—save the great gap of imperial power and personal liberty reserved in the people.

For, finally, after we have divided all these powers in these eight divisions, we have in the centre that space unoccupied which perfectly represents those powers which remain in the people, which they have never granted to our Federal Government, or even, in many cases, to the States; rights still virgin. This great domain I have already anticipated. Indeed it was the subject of most of our early lectures: liberty, property, equality, the right to law, habeas corpus, trial by jury, local self-government, popular election, general suffrage. All these fundamental things would fall into that division. To say more here would be to repeat the first five lectures.

But there are other, more political, rights given to protect the people. Congress must assemble every year; it must have freedom of speech and guaranty against arrest; the House alone can introduce revenue bills. No armies can be maintained for more than two years. No direct taxation from the National Government; no unequal indirect taxation from the National Government. No titles of nobility. Jury trials; indictments; civil rights; the forbidding of all class legislation; the supremacy of the Constitution. And, finally, after all these rights have been enumerated, the great Ninth Amendment says that this enumeration, nevertheless, does not deny or disparage other rights still retained by the people; the final and important thing being that the framers founding this Government consciously and expressly did not intend to give general sovereign powers of conquest or National career. Their Government was, in theory, a committee, bound to report to its masters every two years. This whole sphere in our diagram represents, in a sense, infinity of powers; but the real infinity is in the central sphere of "Y." All the other

divisions are definitely limited and definitely controlled. Failure to understand this is failure to understand the cardinal principle of our Constitution.

# VII

## CHANGES IN THE CONSTITUTION NOW PROPOSED

WE have but two remaining lectures in which to fulfil our promise of considering those subjects of the American Constitution which are likely to bulk most largely in the popular mind in the immediate future. First, we will take the regulation or control of corporations. By an accident of legislation or policy, the Act establishing the Department of Commerce and Labor authorizes the Commissioner to make investigations . . . of the business of *any* (not *every* or *all*) corporation engaged in interstate commerce; and by an Act of February 25, 1903, $500,000 was appropriated to enable the Attorney-General to conduct prosecutions under the same. Now the question of compulsory evidence, publicity of business corporations, and the immunity of those testifying in such matters,

is one thing; the right of a man to keep his private affairs private, to have his private papers sacred, and his house and possessions inviolable, is quite another, a valued liberty right, won in comparatively modern times against the Stuart tyranny. Indeed one of these rights—that a man's house and papers should not be searched without a special warrant stating the cause—was, we may say, invented in Massachusetts. The Writs of Assistance, which allowed general perquisition, were a great abuse at the time that General Gage was stationed in Boston. In an impassioned speech, James Otis objected to them, asserting that they were against English constitutional principles. He won his case; and the same thing was afterwards decided in England by Lord Camden. The broader principle, much older, that a man should not be compelled to testify against himself, is a very cornerstone of English liberty. It is far too precious to part with, but it has undoubtedly been much abused by the trust magnates and other powerful persons who were endeavoring to evade our Federal laws. Now we had several Acts of Congress which re-

quired trusts and their officers, at the request of the Commissioner of Corporations, to make reports to the Government and show their books. They hastened to do so when required. It necessarily resulted from the fact that they acted under Government compulsion, that they were immune from prosecution for anything revealed by the books and documents delivered. This result was doubtless a great disappointment to the President and a great miscarriage of justice. Nevertheless, it might easily have been avoided by drawing the statute or conducting the prosecution so as to require only the secretary or other subordinate officer having possession of the books to produce them, thus leaving the real heads of the objectionable trusts open to prosecution. There can be little question that Judge Humphrey's decision on this point was perfectly right.

As a result of this Beef Trust decision, however, Attorney-General Moody promptly introduced a bill into Congress giving the Government the right to appeal on a ruling of law in criminal cases, and this brings us naturally to the next thing I want to discuss,

the right of not being "twice in jeopardy." We have seen that one of our constitutional liberties is expressed by these words, that no man shall be twice put in jeopardy of his life or liberty for the same offence. That is to say, he is not to be tried twice. From this early English principle grew, in many of our States, the notion that a man was tried twice when the Government had a right to appeal the case to a higher court. Now this really is a misconception of the constitutional principle. No man is twice in jeopardy unless he has been tried twice by a jury—the reason for this being that under Anglo-Saxon ideas no Judge, no King, but only twelve lawful men of the neighborhood can take a man's life or liberty away; but when a man has been tried before a jury and acquitted on a ruling of law which was wrong, and it is possible that the jury would not have acquitted him had the ruling been otherwise, there is no reason why that ruling of law should not be reviewed. It would be better, probably, to have the case at once suspended when the ruling of law is excepted to, so that no jury is in fact brought in on the first trial. The bill drawn, I be-

lieve, by Mr. Moody was promptly (March 2, 1907) enacted, and is simply in line with the rule that prevails in about half our States. There is nothing radical or revolutionary in this, and in the future the Government will have the right to appeal from any ruling of law that it is not satisfied with. Indeed, I only wish this Act had been in force at the time that Judge Humphrey made his celebrated decision in the Beef Trust case. It might have saved a member of the judicial branch a severe written censure addressed by the Chief Executive to the House of Congress, for which we can hardly go back for a precedent to the time when Andrew Jackson said of Chief-Justice Marshall's decision against the State of Georgia: "Well, John Marshall has made that decision—Now let John Marshall enforce it."

The next thing in the Constitution that is a great issue to-day is Art. I, Sec. 3, requiring the Senate to be chosen by the Legislature of each State. Nearly every State in the Union, and both parties in more than one, have adopted resolutions for an amendment of this part of the Constitution, re-

quiring Senators to be elected by popular vote. This stands in the National platform of the Democratic party, and even in the platform of the Republican party in several States; but if the people really desire it, it is not necessary to amend the Constitution to effect this reform. All they have to do is to provide for an expression of popular preference at the polls, just as they do now when electing a President. As you know, we do not elect Presidents directly; we only vote for the electors, but those electors are pledged to a certain presidential candidate. In the same way it is perfectly easy to provide by State statute that the people may be allowed to express their preference for United States Senator at the polls, and then the legislature which they elect will hardly dare go against their expressed will. Substantially this system has been adopted in Oklahoma, in Wisconsin, I think, and in several other States, and if the parties are really in earnest about it they can do it in Massachusetts next winter.

Our third point of discussion is Art. I, Sec. 5: each House shall be the judge of the election, returns, and qualifications of its

own members. Under that section, members of Congress are, as you know, frequently unseated, though they have an apparent popular majority; especially when they belong to the minority party at Washington. Senator Smoot of Utah was very nearly turned out of the Senate, not for lack of votes, but for lack of moral qualifications for a seat in that fastidious body; the opposite principle was vindicated in England more than one hundred years ago in the famous Wilkes case. There is no doubt, however, that the power ought to lie in Congress, except in the case of a mere question of numbers of votes, when it might fairly be referred to the Courts. Such has been the history of this matter in England. The power of the House of Commons to judge of its own elections, returns, and qualifications was early vindicated as against the Crown, but in modern times they have of their own will adopted a judicial procedure.

Art. I, Sec. 7, that bills for raising revenue shall originate in the House, I have spoken of elsewhere. This provision of the Constitution should be observed in spirit as well as in letter. Art. I, Sec. 9, Clause 4—the

Democratic party is apparently committed to an amendment of this section so that Congress shall be allowed to impose direct taxes, or at least income taxes, which the Supreme Court has recently held to be direct within the meaning of the Constitution. This is a matter of which the people should judge. There was a fear in early times that the poor States might tax the rich States if this clause of the Constitution were not put in. If that fear has departed, the Constitution should be so amended. I doubt, however, whether such an amendment would be agreed to by three-fourths of the States. Under present tendencies, that very fact is argued to be a reason for straining or stretching the Constitution without amending it; but such a notion, though held by individuals, has not yet formally been adopted by either of the great political parties. Then of the proposal to tax out of existence, either by income or succession tax, "swollen fortunes." This brings up again the great question which lies before us. Is it the function or province of the Federal Government to step between the individual and his property, to regulate the

private affairs of all men in that most important part of them which concerns their fortunes? There can be no question but that every member of the Constitutional Convention of 1787, not excepting the celebrated Judge Wilson, recently resurrected by the President, would have earnestly answered in the negative. Not the wildest Federalist ever dreamed of putting in the power of the Federal Government the control of his domestic affairs. The Federal Government has not, except at sea or in the army, that cardinal power of a Sovereign Government—to inflict the death penalty for crimes, other than treason. All that even Hamilton aimed at was to make the National Government strong, supported and authoritative at home, and respected abroad. But he, as much as Thomas Jefferson, understood that it was to be purely political. The Government has power to raise revenue for the National defence and the general welfare, and an inheritance tax imposed for that purpose has been held constitutional by the Supreme Court; but a tax which on its face was aimed not at raising necessary revenue but at diminishing or destroying

large private fortunes would be unconstitutional, and for this statement I have very high authority. If, under the Interstate Commerce clause, the Federal Government is to control, not only commerce itself, but the persons who conduct it and the fortunes which are in part derived from it, it may as well control the marriages of the parties thereby enriched and the legacies they may leave to their children. There is no bound or limit to this path short of absolute control by Congress of the people and all their domestic affairs. The fact must never be lost sight of that the framers of the Constitution, as clearly as the English language could express it, sought to deny to the Federal Government any power of direct taxation of the people. It is almost by a fiction of law, by what was at the time regarded as a dubious decision of the Supreme Courts of Massachusetts and the United States that a tax on inheritances was held not to be a direct tax. The law now so stands; but the spirit of the Constitution is against it.

Art. I, Sec. 8, Clause 3 (to regulate commerce among the several States), and Art. I, Sec. 9, Clause 6 (no preference shall be

given by any regulation of commerce to the ports of one State). The great railway regulation bill, secured by the President last year, has been in effect too short a time yet for us to judge of its results. As to its constitutionality, it is still argued that it has two or three fatal defects. First, that it is a delegation of legislative power to an administrative board, and, as such, unconstitutional, or else that it clothes an administrative board with judicial power, which is equally so; second, that it takes away a man's property or the property of railroad corporations without due process of law. This is probably cured by the broad court review provision which was inserted by Senators Knox and Foraker against the opinion of the Administration. Third, possibly, that it is in effect a preference given by a regulation of commerce to the ports of one State over those of another. But on the broad principle whether the Constitution in the Interstate Commerce clause contemplates any such power, a word or two is necessary. We have sufficiently pointed out that the intent of the Constitution is to make commerce among the States free and

unhampered by anybody. If the words they have chosen have nullified such intent, it is at least to be noted that the conclusion will carry us very far. Not only under it may they as well regulate charges, and hence probably the profits, to be derived from commerce with the Indian tribes, but there would seem no reason to say that they may not do the same as to commerce with foreign nations; and, although we think of the railway rate regulation law as applying only to corporations, we are by no means limited to that conclusion if the foundation of the present law is valid, for it rests not on the power to regulate corporations—at present the Federal Government has none—but on the power to regulate commerce among the several States. It can regulate that commerce quite as well when done by individuals as when done by corporations. Therefore, if the principle of the Hepburn Act is valid, all the charges and profits made by individuals engaged in any interstate commerce may be delimitated, regulated or controlled by Congress. Not only that, but the form and law of the bills of exchange and the bills of lading whereby such commerce is

carried on—this, indeed, possibly would not be denied—but the interest to be charged upon such bills of exchange as well. And when we apply this principle to commerce with foreign nations (and the power must apply to one if it applies to the other) we are met with the tremendous consequence that Congress may prescribe all freight or passenger rates of vessels doing business with foreign ports, the laws and conditions under which they shall do such business, and, though it cannot indeed enforce such laws directly, it may lay an embargo on all such commerce when the laws are not observed. Then as to the goods themselves, which may be a proper subject of interstate commerce. It is now proposed to exclude goods which are not manufactured or produced in conformity with a national labor law; but the most radical abolitionist in the times before the Civil War never proposed to destroy the institution of slavery by excluding the cotton or sugar or rice grown in whole or in part by slave labor from any transportation across State lines. Charles Sumner and other abolitionist lawyers were dull and uninventive. It is too bad that it

was so, because otherwise the Civil War might have been avoided.

Then as to the economic side of the question. It is argued that it will make rates inelastic, will arrest the growth of business, and will give a preference to certain ports or certain sections contrary to this provision of the Constitution. It is too early, in my opinion, to judge of any of these things. I will, however, mention one significant event, while reminding you of what I said of the evil effects of interposing boards or commissions between the people and their common-law rights. The *first* decision under the railway rate regulation bill was one arising from the State of Texas, where certain Texas merchants brought suit in the State Courts under the very strict railroad law of Texas, claiming discrimination in the rates charged to the Standard Oil Company as against other companies, and also, I think, extortion in the rates for cotton. The complaining merchants won their case in the State of Texas; but it was removed from the highest court of Texas to the United States Supreme Court, which reversed the Texas decision on the ground that the railroads

having filed schedules under the national railway rate regulation bill, the courts of Texas were powerless, the laws of Texas ceased to apply, and the people of Texas could no longer enforce their own law remedies, or even the common law. All control of commerce was taken from "A" and placed in "AZ." Whatever the extortion or discrimination, they must wait until they could get a ruling from the Interstate Commerce Commission, with ultimate appeal only to the Supreme Court at Washington. And in the long run such rulings will necessarily tend to a uniform mileage rate, not lower than the poorer railroads can afford. The Hepburn law will be, in my opinion, a very good thing for the railroads but will disappoint the expectations of the people and prove an obstacle to the settlement of new localities or the founding of new industries.

This naturally brings us to almost the greatest principle of all, that we are in danger of forgetting—the importance of careful division of the powers. The two rocks ahead of us, in my opinion, are that the people may come to forget the importance

of separating the Executive from the Legislative, and that they may come to forget the importance of separating those powers which belong to the Nation from those which remain with the States or even are reserved to the people. "Render unto Cæsar those things that are Cæsar's." This railway rate regulation bill is the first tremendous example of it, perhaps, in National affairs; though before that there was the old Interstate Commerce Commission, and there is the Bureau of Corporations. I shall say something of the latter later. But in the States, as you know, there has been a tremendous duplication of Boards and Commissions and Committees, all charged with matters of legislation which should belong to the Legislature, or with matters of judgment or administration which should belong to the Courts, or to the ordinary servants of the people. Nearly all these Boards are in effect lawmakers, judges and juries in their own affairs; and though there is sometimes in theory an appeal from them to the courts, it is almost impossible for an ordinary man who has a grievance to get beyond the Board or Commission if it decide against

him. I am not saying that they do not do some good work, but I say the principle is bad, and should be watched carefully. The constitutional rights of a man almost disappear before such a Board or Commission; as they do before a military court in the Army, or indeed before any administrative officer clothed with unchecked power.

Coming from the question of division of powers to that of so-called usurpation, though the word aggrandizement would perhaps more fairly express it, we have noted that that most feared by Thomas Jefferson, usurpation by the judicial branch of Government, has not proved a serious danger; but each of the other branches, as well as each branch of Congress, has shown a tendency, and is now showing a tendency, to exaggerate its powers at the expense of constitutional principles. The interference by the Senate with treaties has already been discussed, as well as the way that it has taken unto itself the shaping of measures of revenue or taxation. So, also, its misinterpretation of its right of confirming Presidential appointments. But the House is by no means guiltless in this last matter. It

has grown to be the custom, so that it has recently been claimed by a Massachusetts Congressman to be the unwritten law, that a large number of Federal officers are in effect to be appointed by members of Congress. Art. II, Sec. 2 of the Constitution says only that "the President shall nominate and by and with the advice and consent of the Senate . . . shall appoint . . . all other officers of the United States whose appointments are not herein otherwise provided for." They are to be confirmed by the Senate; but it is clear that the Constitution intends that members of the Lower House shall have nothing to do with the matter; and the enlightened view of the situation would lead Congressmen to desire this themselves. They gain nothing from the present custom, not even in political power; while they incur the danger of making many enemies, and the loss to the American people of a large part of their valuable time.

The aggrandizement of the Executive power is one that we have traced so carefully through English history and spoken of so often in earlier lectures that there

seems to be now but a word or two to add. The notion that the President should not endeavor to impose his policies on Congress prevails now very largely with that body. Indeed, you will remember what Speaker Onslow said to the effect that a rumor runneth about the House, take care what ye do with this bill; it liketh not the King. Take care what ye do as to that other. It pleaseth the King's Majesty; and he consigned such notions to be buried in Hell—in the emphatic language of that day; but Section 3 of the Article of our Constitution concerning the President's duties says that "He shall from time to time give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient." Our President is, therefore, quite within his constitutional rights in so doing, though it is the last thing that would now be attempted by the British King.

The only express change in the Constitution now seriously proposed is that for the repeal of the Fifteenth, and possibly even the Fourteenth, Amendment. The Fifteenth Amendment, you remember, is the

one which gave the negroes the right to vote. The Fourteenth Amendment is one which was aimed at giving the negroes civil rights; and also at guaranteeing certain cardinal rights to all United States citizens, even against the laws of the States. It was, therefore, the first direct interference of the Federal Government with the condition of the people, their property and civic rights. In a sense, therefore, this is an anti-States' Rights measure. In fact the last three amendments are all somewhat of this nature; which shows that it is not true that, if the people really desire an amendment increasing the Federal power and taking away rights which before that belonged to the States, there is any difficulty in doing so. It has been done no less than three times in the last forty years. This reactionary proposal, however, seems to have been lost sight of in the last year or two; whether or not it is "practical politics," I personally can see no reason for the repeal of either amendment.

Last of all, we come to the one now most discussed. Interstate Commerce—how far do the powers of the Federal Government

extend? Labor, health, marriage, divorce —should the Federal power be extended also to these fields? To this question and the regulation of corporations generally, we shall devote our last lecture.

We may, however, dispose of labor laws, marriage laws and the like in a few words. There is no general desire on the part of the States for uniform, still less Federal, laws in these important social and domestic affairs. For fifteen years the writer served as Commissioner for Massachusetts upon National Uniformity of Law, meeting each year similar commissions appointed under the laws of nearly all the other States. *There is no general desire for enforced uniformity on these subjects throughout the Union.* Climate, conditions, races, religions vary too widely in our great country. The National Conference of State Uniformity Commissions had little trouble in getting its uniform law on Bills and Notes adopted throughout the Union; it has made no progress in labor or marriage legislation except the doing away with the "common law" marriage in New York and a certain reform in divorce *procedure.* The *causes* lie too deep. In

1895 Massachusetts instructed her Commissioners to bring before the National Conference the question of uniform hours-of-labor laws. The conference that year was at Detroit, and the writer, acting as chairman, had the request of the legislature of Massachusetts introduced from the floor. Before the reading was half over, two-thirds of the delegates were up in angry disapproval; a rebuff to our State was only avoided by having the matter smothered in committee.

Uniformity is hopeless on these points—nor is it wise. The Southern marriage laws are aimed to protect the young girl against dishonor; the Northern follow rather the European view of protecting the man, or the legitimate wife, against the adventuress. Half the States think a marriage a mere contract; others hold to the view that it is a status, or a sacrament of the church. In labor legislation there is even less desire for national laws. What little there is is fostered partly by the labor unions, but mainly by Northern manufacturers. In my experience you will not get six States to vote for a uniform law on causes for divorce, nor

six for a nine-hour day in factories. But if they will not do it by voluntary legislation of their own, how absurd to suppose they will accept Federal compulsion by a constitutional amendment—or submit to the strained construction whereby the President urges those powers "must be found"!

# VIII

## INTERSTATE COMMERCE, THE CONTROL OF TRUSTS, AND THE REGULATION OF CORPORATIONS

THE right to "regulate commerce among the States"; these five words have given rise to more doubt among statesmen, and to more construction by the Courts, than any other phrase in the Constitution. You will note that this power is placed *third* in the line of the eighteen paragraphs of powers granted to Congress. This fact can hardly indicate its relative importance, as although they put the power to tax and the power to borrow money ahead of it, yet they put the power to raise armies and declare war much lower down. Now, the opinion of what this paragraph in the Constitution means ranges all the way from those who say that it simply means that the States may not regulate such commerce, and does not imply that the Nation may, in

any broad sense, but only gives it the necessary local control over the physical instrumentalities of commerce, which, in those days, were only vessels or stage coaches, and over the actual goods transported while in process of transit; this is the old strict construction view, and undoubtedly our fathers started with this; and they also probably thought that the States could make regulations concerning interstate commerce so long as they did not come into conflict with any law of the United States; to, from that extreme, the radical view of some statesmen to-day who say that under these five words not only has Congress the power to regulate, but the power to forbid or to tax interstate commerce; that the word "commerce" includes not only goods in transit but all articles, crops, or manufactures which may ultimately become the subject of such commerce; and all instrumentalities of such commerce, physical or documentary; that the right to regulate further includes not only the regulation of the goods or articles, but of the persons who conduct the commerce and hence of their charges or even their profits; and this last, of course, leads to

the regulation of the corporations who do so, if it be conducted by a corporation, as in most cases it is. You can see that such a broad construction of the power will really put the control of all the people's commercial affairs in the hands of Congress or the Federal Government, except only such narrow matters and such articles of limited use or transport as are both made, moved and finally consumed within the lines of one State; and under the interpretation proposed it would even apply to them if they were in fact made, grown or sold by a corporation doing business in more than one State. Take, for instance, a man who has a cranberry bog down near Fall River, and a neighbor who has an adjoining cranberry bog in the neighboring State of Rhode Island. If they form a company and put the two bogs together, they become, under this interpretation, subject at once to the control of Congress and no longer under the laws either of Massachusetts or Rhode Island.

I do not know that I have convinced you that such centralization would be tremendous, but if I have not, I can only hope that

you will think it over. Time forbids my giving all the instances that I think would lead you to see what I mean. The great bulk of commerce is or may be interstate; and this interpretation of the Constitution would not only take the control of the property away from the citizens under their State laws but would deprive them of their State laws in forming corporations, or possibly even partnerships; would make it necessary for them to conduct their litigation in the Federal Courts; would deprive the States of police powers and the local courts of jurisdiction; and finally deprive the States, and probably even the towns or the counties where they are situated, of the power to tax them.

You remember there was one great centralization move attempted under the Fourteenth Amendment. The first section says that no *State* shall deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws. Under the theory of the radical republicans, at that time the old Abolitionist party, this gave the Federal Government the right to step in whenever any negro

claimed that he was not being treated fairly in any business, or that he was deprived by anybody or any *person* of any civil rights. This interpretation put all the domestic and social rights, the moment any claim of race distinction was involved, in the hands of the Federal Government; enabled it not only to interfere with State courts or laws, but to make acts of Congress of their own which should bear *directly* upon the citizen in his domestic, social, or local affairs. Such laws were, in fact, passed, and such interference was, in fact, made by the Federal officers and courts. Now this, you can see, would have been a process of centralization very great—though probably, I think, not greater, at least as far as commercial affairs or rights of property are concerned, than were we to adopt this extreme interpretation of interstate commerce. That attempt by the predominant party under the Fourteenth Amendment, was precisely as if the Norman kings, after the Conquest, had said that any case, or proceeding, or crime in which any Norman was concerned, or in which there was any claim of force by his Saxon neighbors, or indeed any matter

which concerned the two races, should at once be taken away from the local English courts and brought to the King's Court which he held in person at Westminster, and furthermore, that the local laws should no longer apply to the Normans and Saxons, but that in any case where the rights of both were involved the King of France and England, of the empire, should be allowed to make laws without the consent of the local English Parliament. What was the result? Well, the result with us after the Civil War was precisely what it was in England after the Conquest—only that we re-asserted local liberties much more speedily by reason of the fact that we had a Supreme Court constructed for just such cases. It took the Federal Supreme Court just about twenty years to destroy this attempted centralization—to say that no powers were taken from the States and no liberties from the people, by the Fourteenth Amendment, only that some were additionally guaranteed, and that all that it meant was that the States could not make any law which, *on the face of the law*, appeared to go against these cardinal English liberty rights. In other

words, the grand effect was simply to reaffirm the cardinal principles of Magna Charta as guaranteed as well by the National power against the action of the States as against its own action—making a double safety-lock, as it were, of these cardinal rights through both the Federal and the State Constitution, precisely what they had previously done in the case of bills of attainder—but giving no new power to the Federal Government over the people of the States.

There are certain rights, you will remember, which come under our "XZ" subdivision, which are guaranteed both by the States and by the Nation in the Federal Constitution, certain liberties protected from the action of both, and the only effect of the Fourteenth Amendment here was to add life, liberty and property, and the equal law clause of Magna Charta, to the others; and I do not think I am inaccurate when I say, at all events it is broadly true, that every attempt by Congress under the Fourteenth Amendment to make laws applying directly to the people of the States—in other words, every attempt to assume new powers of cen-

tralization under the Fourteenth Amendment not previously granted in the Constitution—was sooner or later declared null and void by the Supreme Court of the United States. And this may yet be the case with the attempted National control over corporations and industries generally.

How, then, are we to cure the evils of trusts? For, as you doubtless know, this whole talk of the interstate commerce clause of the Constitution has arisen solely by reason of our desire to regulate and control trusts—the evils of great corporations, tending to monopoly, or not to-day properly regulated by the laws of the States which created them. Even the railways, had they remained in their State lines, would probably never have discovered that they were subject to a National Commission.

President Roosevelt was the first of our statesmen clearly to express this difficulty. In words that have become historical he pointed out at the very beginning of his administration that the trouble with these trusts, that is to say, these huge corporations chartered by individual States (for such they had now all become), was that

they were in practice *amenable to no sovereign*. That was exactly the truth; and that is still the difficulty. Corporations are artificial bodies. It is only by a fiction of the law that we have grown to give them any powers at all. It is only by an accident of our National organization that we have permitted them to act in more than one State. A corporation of New Jersey might just as well have been prohibited at the start from acting in the State of Georgia or Massachusetts, as have been allowed so to do. I can only say here that the accident of the law's development worked that way. Broadly speaking, this right does not exist as between different nations; but owing to the desire of our States to be friendly to each other, and the full faith and credit clause, so-called, and other implications in the Constitution, our courts early formulated a doctrine of "comity," which you might translate as courtesy—under which the corporations of one State were allowed to come into another State and do business. And not only this, but they came in *not only with the powers which that State chose to permit to its own corporations*, but with all the im-

possible or wrongful powers that might have been granted to it *in the State, New Jersey or West Virginia, which gave it its charter.* Unfortunately, this business had proved profitable to the States having lax laws. New Jersey is said to run her State Government entirely on the license fees of corporations, most of which do business elsewhere; and many of the States have got to be mere breeding-nests for these predatory corporations; once hatched in the State, New Jersey or Maine or Delaware, and having paid their birth tax, as it were, the parent State took little further interest in them. Like birds of prey, they leave the mother-perch to violate the laws or monopolize the business of other States. And they are never controlled, or warned back, still less "called down," by the State which created them. The President pointed out in early messages that some such corporations were actually chartered expressly for the purpose of breaking or evading the laws of other States. He put in action all the laws of Congress and all the energies of his department, and, as a result, pressed to a victory for the Government the great Northern Securities

case, to the probable surprise of most of the offenders. In this case the Supreme Court, though by a divided decision, established the principle for which the President was contending. That is to say, that under the Sherman Act—the anti-trust act which forbids combinations of two or more persons or corporations to restrain trade among the States—a single corporation created under the laws of New Jersey for the purpose of holding two railroads and thus evading the national law, was, and remained, a device or conspiracy within the purview of that Act; was therefore forbidden by it; and could be dissolved at suit of the Federal Government.

Here was a complete victory; and under this decision other victories have followed. There is no trouble, therefore, in restraining or breaking up combinations or corporations organized to monopolize a trade or a business, when that trade is in *its* nature interstate commerce. Railroads which cross State lines obviously are interstate commerce corporations. So far all right.

But we did not exhaust the evil, though some almost thought we had exhausted the

powers of the Federal Government. Under the ordinary older view, only railroads and steamboat or other transportation companies were held to be interstate commerce corporations. In fact, our Supreme Court has decided that manufactures, however large, and although conducted by the same combination in many States, are not commerce, still less interstate commerce. And nearly all the large trusts complained of by the people, which the President is trying to destroy or control, are in the nature of combinations or consolidations of manufacturing corporations, or at least corporations which deal in commodities, manufacturing or trading companies. Does the mere fact that the corporation making them expects that ultimately the goods may be shipped into other States of the Union—or even intends so to ship them itself—does this alter the state of things? Are they for that reason interstate commerce? Our Supreme Court, in the famous Knight decision, held not. Are we then left without a remedy? That is to say, under the bad laws of some States, obnoxious trusts, corporations with dangerous powers were being created. When

created they did business throughout the Union. Had the Federal Government no remedy? Was there no remedy for this state of things, no possibility of a law by which the people could be protected against the injuries they suffered?

Three remedies were laid down in the report of the Industrial Commission, and the one they recommended was the one which, at least for some years, the President seemed to prefer. These three remedies are, first, what is perhaps the ideal remedy, to have the States and the Nation work together; that is to say, all the States voluntarily of their own good sense adopt good corporation laws, if possible the same corporation law, so that the evils complained of will not exist. And by corporation laws, of course, I also mean laws aimed at what are called trusts, abuses in restraint of trade, monopoly, etc. This, as I say, would be the ideal remedy. But from the nature of the States, if not from human nature, it seems too much to hope for in this world. Even if forty-five of the States saw the light and enacted an identical good law, it would be all the more profitable for the

forty-sixth State to charter these New Jersey corporations with full powers and let them fly away over the land, provided only that they paid an annual tax to the State of New Jersey. There is, however, one remedy, but it does not seem to have been mentioned much in the discussion, certainly not by the President. A State really has full power to protect itself if it wishes to, except indeed, under the modern and radical view of the words "interstate commerce." That is to say, it is admitted that no State is obliged to permit the corporation of any other State to come within its borders and do business. If the State of Massachusetts complains of the Steel Trust, for instance, it has the entire constitutional right to exclude that corporation from the State markets and stop all its business and affairs at the State line. And, moreover, it can prevent the same results indirectly attained by forbidding one corporation to own stock in another—this, indeed, was the good old common law. These, you see, would be perfectly effective remedies. There is nothing to prevent our telling the Standard Oil Company it cannot do business in the State

of Massachusetts from to-morrow; there is nothing to prevent our forbidding the United States Steel Trust of New Jersey to own stock in the Washburn and Moen Company of Worcester. Indeed, something like this has been done by the State of Texas. The remedy is drastic and complete. The only trouble is that it may be too complete. The reason it has not been adopted, in my opinion, is very simple—the intelligent radicals are not sincere, and the sincere radicals are not intelligent. Whatever be the reason, however, the fact is that this remedy has never been tried and still remains among the powers of the people of the States.

The President's remedy is Federal arrogation of the power by a strained construction of the Constitution. Now, it is always assumed by the radicals that this broad interpretation of the words "interstate commerce" will be a good thing for the people and will strengthen their powers as against the great trusts and corporations. I believe the exact opposite to be the case. If the words "interstate commerce" be stretched to include nearly all business corporations, the States and the people of the States will at once

become powerless. They will lose all their rights under their own laws. It has been decided by the Supreme Court—in the Pensacola Telegraph case, against the dissent of its greater judges—that the one exception to the power of a State to forbid a corporation to do business within its limits is the case of an interstate commerce corporation. I hold that, like the rights of the Fourth and Fifth Amendments, the right to conduct interstate commerce is a personal right, not guaranteed to corporations of other States. This case was originally decided only of a telegraph company extending across State lines, but it has since been extended to railroads, and under the construction contended for, apparently by the Administration, it would cover all corporations doing business directly or indirectly in more than one State. We had an object lesson in this this year. The first effect of the much-lauded railway rate regulation bill has been to deprive the people of the States of all their common-law rights as to the charges of railroads and most of the State's power to control them by statute. The Southern, the Western, States are already

in arms against it, invoking against the Federal power the Eleventh Amendment. It may be that we shall find Congress makes laws much better than the States did; we can now only hope so. It may be we shall be better protected and have better legislation in Washington than we could make in Boston; but the fact will always remain and must not be lost sight of that we are relegated to only one tribunal instead of two; we are now dependent only on legislation from Washington, controlled by a Federal Commission, and can no longer protect ourselves by legislation in the States. This, you know, is the great fight now going on between the States of the South and the West against the Federal Government. Federal courts have issued injunctions against enforcing the State railroad laws, and the States, both by the Executive and by the Courts, have been angrily resistant. Railroads are instrumentalities of interstate commerce unquestionably. I have little doubt, therefore, that the Federal Government will prevail as to them; but note well the vast change if the same principle applies to all other kinds of business as well.

We will, however, dismiss the possibility of uniform action by the Nation and by the States in this great question, as the President has dismissed it, and come to the second proposition, which is the one recommended by the Industrial Commission, and, at first, at least, adopted by the President. It has also in part passed into law. The Federal Bureau of Corporations was established as a consequence of it. This principle is substantially this. Under the Federal Constitution Congress has power to regulate interstate commerce and also the persons who conduct it. We do not propose the revolutionary change that would result from giving all corporations Federal charters, but we do propose that any *and all* corporations which do interstate commerce shall, either under the taxing power or under the direct power given to Congress over such commerce, be compelled to conform to a certain standard both of conduct and of organization. They shall pay a certain annual license tax, and as part of the machinery of collecting that tax, make the fullest reports giving publicity of all kinds as to all their transactions, showing the fares or rates,

how much they are earning, whether their charges compare favorably with those of other corporations or even with the standard that the Government may set, and, finally, giving the Government full power over the organization of such corporations. That is to say, to see that there is no watered stock, no fictitious debt, and none of the other devices by which extortionate profits are made or monopolies established. And this by automatic process, as it were, prosecuting or depriving of their licenses *all* corporations whose reports do not show conformity with the law. In my opinion there is no constitutional difficulty as to this course, nor have I seen that the President thinks there is. I do not know why there seems to be a tendency just now to abandon it for the more radical, if not revolutionary, other method of control, that of requiring all corporations doing interstate commerce business to be Federal corporations acting under Federal charters, Federal laws, Federal courts, Federal control, and paying taxes to the Nation and not to the State. This subject I have repeatedly adverted to in the last two lectures. I have tried very hard to look

the matter fairly on both sides, but remain, after five years' investigation and study, just where the Industrial Commission was in its final conclusion in the year 1900—that this method would be drastic, revolutionary and subversive of the whole principle of the American Government, which places the control of political affairs only in the hands of Congress and leaves social and domestic affairs to the States to regulate.

Moreover, there is a terrible fault in this method, as proposed, and so far as it now exists. The law recommended by the Industrial Commission was fair and equal to all corporations. It required all and every corporation doing interstate commerce business to report to the Bureau of Corporations, placed it under its control in so far as it did such business, and gave no power to apply to one corporation a different rule than was applied to the others. By what it seems to me was an unfortunate mistake under the act as drawn, the Commissioner of Corporations, an Executive officer resembling indeed one of the early commissioners of the Norman kings, created for the same sort of purpose, was clothed with arbitrary visit-

atorial, inquisitorial, dictatory powers. That is to say, he, or the President advising him, is authorized to single out one corporation to attack; he is not required to extend the same rule and the same methods of attack simultaneously to all corporations at the same time; he may launch condemnation against one man or one corporation as arbitrarily as an excommunication by the Pope. Visitatorial powers are always objectionable, but are certainly necessary in the case of corporations, which are merely creatures of the State and have no natural rights; and inquisitorial powers of a most drastic and arbitrary kind are given by this Act of Congress to the Executive and its officers. That is to say, the Commissioner of Corporations or his agents may at any time descend upon any corporation, examine into all its affairs, insist on seeing all its accounts, its books, and even its private correspondence. This, you know, could not be done with an individual citizen under Anglo-American constitutional principles. You cannot have general search warrants nor compel criminating evidence from any man. If you do, then you must not prose-

cute him for any offence that you discover by such methods. But our Supreme Court has just held that this great liberty right was a *personal* right; that it applies to men and not to artificial bodies like corporations; and that these latter, being creatures of the State, can be treated by it in any manner that it choose; and that the Federal Government has the same powers over State corporations, in so far as they do interstate commerce, that a State itself has over the corporations it creates. This decision accordingly, ratified and armed this law—in so far as the examinations and reports of interstate commerce *corporations* were required. The law was held constitutional as to them. We have succeeded, therefore, in getting all the matters of corporations engaged in interstate commerce under the control and the investigation of the Federal Government. This was a great achievement, and it is due entirely to the energy of the present President. There can be little doubt but that it is perfectly constitutional, provided only the definition of the words "interstate commerce" be not strained. But when the law goes on, as it does, to give the

Commissioner of Corporations, or any administrative officer, acting with or without the advice of the Executive, the power to single out what corporation he shall attack and leave others entirely unmolested—when the law is not a general law applying to everybody, but a permission to the Executive to harry or attack or fine such parties as he or his officers may select—it becomes absolutely counter to Anglo-Saxon constitutional principles. The arbitrary power to descend upon such corporation as he selects, "to go upon it or send upon it" at will or on displeasure—is exactly the kind of authority, the kind of law, that the Norman kings or Henry VIII or Charles I used to enact in council and without the consent of Parliament. The mere selection of a "trust" for such investigation is business ruin to it, though innocent. A bank examiner visits *all* banks; otherwise his presence in a bank would cause a run upon it. The right of the Englishman to equal law is guaranteed in our Constitution; and even the unfortunate corporation is admitted to have property rights, and probably the same right to equal treatment. The present law,

therefore, is wrong, and should be amended at once or the complaints will grow louder and louder. The equal, self-executing method recommended by the Industrial Commission could, they say (Vol. XIX, p. 651) "be employed with little or no danger to industrial prosperity"—such has not proved the case with the present one. Moreover, it may be all very well when administered by an honest Executive seeking fairly the good of all the people; but we cannot be sure that we shall always have such a President. If the law continues to exist as it reads now, it will place in the hands of any unscrupulous Executive the most tremendous engine that has ever been created for subverting the principle of free government; for obtaining extraordinary privileges or grants of money; for controlling the business interests of the country; for party corruption, and for perpetuating himself or his party in office. We must embark upon no course of legislation which places in the hands of the Executive or any officer the arbitrary power to descend upon the trusts—to "send upon or go upon them," as Magna Charta has it—to select

which one he shall attack, which one he shall fine, which one he shall pardon, and which one he shall leave immune.

The tendency of the time is the blind rush to cure an immediate evil, oblivious of all else, reckless of method or consequences. Because certain sections of the country were aggrieved by excessive freight charges we are asked to abandon our frame of government and put our lives and our affairs in the hands of a centralized power at Washington. Have you any of you thought of the other side, even in this simplest and most proper application of the Roosevelt theory? We have, in this State, complained a great deal of the merger of railways, of the operation of the Boston & Albany, for instance, by the New York Central. Have you yet considered the practical working of the President's plan, even as to railroads—which we all admit to be a proper subject of interstate commerce? That it will ultimately place the control of our railways, yes, even of our trolley lines, in the hands of a power far more remote and far more indifferent to the welfare of the people of Massachusetts

than even the management of the New York Central can be? The directors of the New York Central must, at least, care somewhat for the prosperity of their business in Massachusetts; but a Government controlled by the Congressmen of the Mississippi Valley or the far West will be quite as indifferent to our needs and desires as they have been for the past ten years to our clamor for free coal, free hides, and other free raw materials. We now complain of the delays on the Boston & Albany Railroad; but we can at least go before our own State Railroad Commission, and they have power at once to give redress. But suppose it were a Federal corporation; it could not be sued in the courts of Massachusetts, it would not be subject to the laws of Massachusetts, it could not be controlled by our Commission, and to any complaint of a passenger from Newton Centre that his train was late, it would serenely refer him to the Interstate Commerce Commission at Washington—at such time as they chose or might find leisure to listen to his story. I admit that the railroads are one proper subject of regulation under the Interstate Com-

merce Clause of the Constitution; but I earnestly assert that if all control or power over them is taken from the people of the States where they run, and handed over to an overworked board of political appointees at Washington—the last condition of the people of these States will be worse than the first.

We have now concluded our brief survey. I shall be well content if I have called your attention to a few cardinal propositions. I am aware that in this course I have taken the unpopular side. A Chicago newspaper, referring to these lectures, uses the following words: "Whenever a Federal railway or food inspection law is needed, whenever any evil is to be cured which the States will not correct, the Professor would urge us to let the evil be, lest we find ourselves hopelessly under the Government at Washington. Liberties are of little worth if they cannot be exercised." Now this is a fair sample of the kind of criticism I have met with, and betrays the need of education of this Chicago editor in just such subjects as we have tried to explain. Note in the first place that the very instances he chooses are precisely the

instances which I have mentioned as proper for Federal regulation. I do not question that both railways and the commerce of adulterated foods or drugs across State lines may properly, and wisely, and constitutionally be controlled and regulated by the Government; the Industrial Commission drew up a bill for Congress which should in the same manner control the traffic across State lines in goods the product of convict labor. This is apt to be the case with all the advocates of Federal aggrandizement. The examples they choose are precisely the ones upon which we are all agreed. If I have seemed unduly critical of our present President, it is merely that he does so many more things than other Presidents have done that there is greater chance that some provoke our discussion. With many of his objects I am in sympathy. But I am looking to the future. In my opinion, every one of these objects can be gained in constitutional ways, in methods which will not alter our frame of Government and hand over our most precious heritage shattered and impaired, to be perverted to the selfish uses of some less patriotic President in some

future time. The American people are silent to-day. That is simply because they trust the good intentions of the President. If it were Andrew Johnson that were doing these things, you would hear a very different story. But if the States, to use the Chicago newspaper's phrase, will not correct an evil, it is, in the last analysis, because they do not consider it such. When they do so consider it, they can cure it themselves, either by ordinary legislation or, if necessary, by amendment to the Constitution. As Mr. Roosevelt said of Oliver Cromwell: "He was for good government, but it was not for him alone to insist on what good government was."

I shall be satisfied if I have left some half a dozen concepts clear in your mind. First, local self-government and the common law, both forever essential to a free English people. Second, the separation of the powers, that the Executive shall not control legislation, or government officers assume judicial powers. Third, the great principle that has kept our Nation alive so far, that the Centralized Government of our mighty empire is confined to political pow-

ers alone, National defence, our relation to other nations, and, possibly, national improvements—such as the deepening of the Mississippi River; while the domestic affairs of the people—men's lives and liberties, their acquirement of property, and their relation to their neighbors—is left to each man's own State to control, each State wisely differing in its laws where differences of climate, race conditions, or industry so demand; and that any attempt forcibly to make them all conform to a procrustean rule is the height of unwisdom and folly. And, finally, that our Constitution demands everywhere a republican form of government—everywhere that our flag shall go. As the Thirteenth Amendment puts it, slavery shall not exist—not only in any State—but in any place subject to the jurisdiction of the United States.

And the great document itself is not a dry code of rules, but the sum and substance of our liberties gained in a thousand years of struggle for freedom; and, as was said by one of our great Chief-Justices, the Constitution "speaks not only in the same words but with the same meaning and intent with

which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States"; and by the other, Marshall, "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves." And again, in another case: "The genius and character of the whole Government seems to be that its action is to be applied to all the external concerns which affect the States generally, but not to those which are completely within a particular State." And, finally, by George Washington: "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument for good, it is the customary weapon by which free

Governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." And by Abraham Lincoln: "To maintain inviolate the rights of the States to order and control under the Constitution their own affairs by their own judgment exclusively is essential for the preservation of that balance of power on which our institutions rest."

It is a sad contrast between the way that so many of our people, or our newspapers, feel to-day, one hundred and twenty years after the adoption of our Magna Charta, and the way the people felt in England, for the first one or two centuries after the adoption of their own. The great Confirmation of Charters of Edward I (1297) provides—strangely anticipating the American doctrine of the enforcement of the Constitution by the courts—(Section 2), "And we will, that if any Judgment be given from henceforth contrary to the Points of the Charters aforesaid by the Justices, or by any other our Ministers that hold Plea before them against the

Points of the Charters, it shall be undone, and holden for nought;" and (Section 3), "And we will, that the same Charters shall be sent, under our Seal, to Cathedral Churches throughout our Realm, there to remain, and shall be read before the People two Times by the Year;" and (Section 4), "And that all Archbishops and Bishops shall pronounce the Sentence of Excommunication against all those that by Word, Deed, or Council do contrary to the aforesaid Charters, or that in any Point break or undo them. (2) And that the said Curses be twice a Year denounced and Published by the Prelates aforesaid." And in 1253, only thirty-eight years after John's Charter, in the thirty-seventh year of the reign of Henry III, a popular King, a great jurist, and a radical maker of new laws: "*On the third day of May* [I read from the Statutes of the Realm in Latin] *in the great hall of the King at Westminster, in the presence of the King and his brother and the Marshall of England, and the other estates of the Realm, We, Boniface, Archbishop of Canterbury, and the Bishops of London, and Ely, and Rochester, and Worcester, and Lincoln, and*

*Norwich, and Carlyle, and St. David's, all appareled in pontificals, with tapers burning, against the breakers of the liberties or customs of the Realm of England, and namely those which are contained in the Charter of the Common Liberties of England, excommunicate, accurse, and from the benefits of our Holy Mother the Church, sequester all those who, by any craft or wiliness, do violate, break, diminish or change the statutes and free customs of the Realm of England, to the perpetual memory of which excommunication we, the aforesaid prelates, have put our seals.*" So in 1253 they felt—and so in 1907 should we feel now.

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